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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

FEDERAL MINE SAFETY and
HEALTH REVIEW COMMISSION,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TIMOTHY M. BIDDLE *
JOHN T. SCOTT, III
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for the Petitioner*

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QUESTION PRESENTED FOR REVIEW

Where an agency and the District of Columbia Circuit had previously ruled that the meaning of language in the federal mine safety statute was plain, but the successor agency reverses this interpretation despite Congress's re-enactment of the same language, has the D.C. Circuit now committed error by misapplying *Chevron* to defer to the agency's about-face and overturn the court's own precedent?

PARTIES TO THE PROCEEDINGS BELOW

In the proceedings before the United States Court of Appeals for the District of Columbia Circuit to review a decision by the Federal Mine Safety and Health Review Commission, Clinchfield Coal Company * was the sole petitioner. The Federal Mine Safety and Health Review Commission was the sole designated respondent, but did not file a brief or participate in oral argument. The United Mine Workers of America intervened in opposition to Clinchfield Coal Company.

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* Clinchfield Coal Company is a subsidiary of Thames Development, Ltd., which is, in turn, a subsidiary of The Pittston Company. The Pittston Company is a publicly owned corporation. However, none of its subsidiaries, including Clinchfield and Thames Development, Ltd., are publicly owned corporations. Clinchfield Coal Company has one wholly-owned subsidiary, Clinchfield Cogen Company.

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FEDERAL MINE SAFETY and
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UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Clinchfield Coal Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit dated February 9, 1990.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated February 9, 1990, is reported at 895 F.2d 773 (D.C. Cir. 1990), and is set forth at Appendix 1a. The Court of Appeals affirmed a

decision by the Federal Mine Safety and Health Review Commission ("Commission") dated November 28, 1988, which is reported at 10 F.M.S.H.R.C. 1493 (1988) and is set forth at Appendix 17a. The Commission's decision in turn affirmed a decision of Commission Administrative Law Judge ("ALJ") Melick dated July 23, 1987, which is reported at 9 F.M.S.H.R.C. 1276 (1987) and is set forth at Appendix 39a. A prior decision by the Commission dated September 26, 1986, remanding the case, is reported at 8 F.M.S.H.R.C. 1310 (1986) and is set forth in Appendix 50a. The initial ruling on the merits by ALJ Moore on July 23, 1984, granting Clinchfield's motion for summary judgment and dismissing the case, is reported at 6 F.M.S.H.R.C. 1782 (1984) and is set forth at Appendix 77a. ALJ Moore's earlier unreported ruling on Clinchfield's motion to dismiss, dated December 16, 1983, is set forth at Appendix 81a.

JURISDICTION

The opinion of the Court of Appeals was issued on February 9, 1990 (App. 1a). The Court of Appeals denied a timely petition for rehearing on April 12, 1990 (App. 15a). This petition is filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved, set forth at Appendix 84a-88a, are:

Federal Mine Safety and Health Act of 1977 ("Mine Act") §§ 103(k), 104(a), (d), 107(a), 111, 30 U.S.C. §§ 813(k), 814(a), (d), 817(a), 821.

Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), Pub. L. No. 91-173, § 110(a), 83 Stat. 758.

STATEMENT OF THE CASE

Background

This case involves a court's incorrect interpretation of a provision of a federal statute and its disregard of this Court's teachings as to proper construction. It also concerns, however, an issue of transcendent importance: the misuse of this Court's ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 832 (1984), to overturn and reverse prior precedent interpreting the plain meaning of a statute.

The Commission, reversing years of agency and court rulings, decided that miners were entitled to a week's compensation under § 111 of the Mine Act, even though a statutory prerequisite to such compensation had not been met. It reached this result by giving effect to what it viewed were the general purposes of the statute rather than to the law's actual language. The court of appeals went along with this improper approach. What makes the court's ruling particularly troubling is that, in order to affirm the agency, the court was forced to overturn its own contrary prior ruling on the same issue—and to ignore a contrary opinion by the Third Circuit. It did so by effectively rewriting its own prior ruling to recast it as a "step two" *Chevron* analysis, when, in fact, the earlier court had expressly ruled that the plain meaning of the statute "compelled" denial of compensation in a case identical in its relevant facts to the case now at bar. The court's error was thus twofold—it ignored not only the instructions of this Court on statutory construction, but more fundamentally, violated the principles of *stare decisis* and misused *Chevron* to justify that violation. The court's actions raise significant issues concerning adherence to *stare decisis* and to this Court's own rulings which, if not addressed now, will inevitably recur.

Proceedings Below

On June 22, 1983, following an accident at Clinchfield's McClure No. 1 Mine, a Mine Safety and Health

Administration ("MSHA") [1] inspector issued an order pursuant to § 103(k) of the Mine Act,[2] which closed the mine and required the withdrawal of all miners. While the miners were still idled by the § 103(k) order, and the mine was still closed, the same inspector subsequently issued a second order, this time pursuant to § 107(a) of the Mine Act, based on his finding that an imminent danger existed in the mine.[3] Although such § 107(a) imminent danger orders can and often do allege violations of mandatory standards, this one did not, but was terminated on July 18, 1983, before the § 103 order was terminated.

On September 20, 1983, Local Union 2274, District 28 of the United Mine Workers of America ("UMWA"), representing the miners employed at the McClure No. 1 Mine, filed a complaint for compensation against Clinchfield pursuant to the third sentence of § 111 of the Mine Act.[4] The UMWA sought one week's compensation plus

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[1] MSHA, part of the United States Department of Labor, carries out the Secretary of Labor's duties under the Mine Act.

[2] Section 103(k), 30 U.S.C. § 813(k) (1982), App. 84a, authorizes the issuance of an order following an accident "to insure the safety of any person." A § 103(k) order can require withdrawal of miners. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 29 (1977).

[3] Section 107(a) of the Mine Act, 30 U.S.C. § 817(a) (1982), App. 86a, authorizes the issuance of a closure order where "an imminent danger exists."

[4] The third sentence of § 111 provides:

> If a coal or other mine or area of such mine is closed by an order issued under § 104 [30 U.S.C. § 814] or § 107 [30 U.S.C. § 817] of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (1982), App. 87a.

interest for the miners on account of the idlement allegedly caused by the § 107(a) order.

Clinchfield moved for summary decision on the grounds that (1) the § 107(a) order on which the UMWA based its claim did not idle any miners, as the third sentence of § 111 requires; and (2) that order was not issued "for" a violation, as that sentence also requires. Commission ALJ Moore ultimately granted Clinchfield's motion and dismissed the UMWA's claim, finding that the § 107(a) order was not, as § 111 requires, issued for a violation: "The mine was closed because an inspector thought an imminent danger existed[,] not because he thought there was 'a failure of the operator to comply with any mandatory health or safety standards.'" *UMWA v. Clinchfield Coal Co.*, 6 F.M.S.H.R.C. 1782, 1784 (1984) (ALJ Moore), App. 80a. ALJ Moore's decision followed prior rulings by the agency and federal courts (discussed *infra*), consistently tying the extent of compensation liability to MSHA's findings as set forth in the withdrawal order.

The UMWA petitioned the Commission to review ALJ Moore's decision. It noted that in March 1984 (seven months after the miners had returned to work, and nine months after issuance of the § 107(a) order), MSHA had issued several orders under § 104(d) of the Mine Act, charging Clinchfield with violations of mandatory safety standards, and that Clinchfield did not contest the orders.[5] Those violations, the UMWA argued, caused the June 1983 accident that prompted the § 107(a) order. It thus asked the Commission to hold that the miners

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[5] Section 104(d), 30 U.S.C. § 814(d) (1982), App. 85a, provides for the prompt issuance of a withdrawal order based on a violation when the inspector finds that the violation was caused by the operator's "unwarrantable failure" to comply with a mandatory standard. In this case the § 104(d) orders were issued to record the results of MSHA's investigation of the June 1983 accident, and to trigger the assessment of $50,000 in civil penalties against Clinchfield, which Clinchfield paid in full. Those orders did not idle any miners.

were idled by an order which should have alleged a violation.

In September 1986, the Commission reversed existing law and the ALJ, ruling that, despite § 111's language and prior agency and judicial precedent to the contrary, the fact that the § 107(a) order did not allege a violation was not fatal to the UMWA's claim if there was some "causal nexus" between that order and the violations which MSHA later alleged. *UMWA v. Clinchfield Coal Co.*, 8 F.M.S.H.R.C. 1310 (1986), App. 50a. The Commission remanded the case to determine whether such a "nexus" existed. Based on stipulations reached by the parties, in July 1987 Commission ALJ Melick ruled that the miners were entitled to compensation; in addition, he ruled that the miners were entitled to prejudgment interest on the award. *UMWA v. Clinchfield Coal Co.*, 9 F.M.S.H.R.C. 1276 (1987) (ALJ Melick), App. 39a.

Clinchfield sought Commission review, asking the Commission to reconsider its earlier rulings in the case and to reverse the ALJ's decision on interest. In its decision issued November 28, 1988, the Commission reaffirmed its prior rulings, held that, given the stipulated "nexus," the § 107(a) order had been issued "for" a violation, and determined that a right to prejudgment interest should be read into § 111. It thus affirmed the ALJ's decision, although it modified his calculation of prejudgment interest. *UMWA v. Clinchfield Coal Co.*, 10 F.M.S.H.R.C. 1493 (1988), App. 17a.

Clinchfield then sought judicial review of the Commission's decision pursuant to § 106 of the Mine Act, 30 U.S.C. § 816(a)(1) (1982). In its decision issued February 9, 1990, the court of appeals affirmed the Commission. *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773 (D.C. Cir. 1990), App. 1a. The court held Clinchfield liable for compensation even though the § 107 order alleged no violation of health or safety standards, as § 111

specifies. The court found that the "for a failure" clause of § 111 could reasonably be construed to require merely a "causal nexus" between the § 107(a) order and the later-cited safety violations. *Id.* at 775, App. 4a.

The court was forced to confront its earlier contrary ruling in *District 6, UMWA v. United States Dep't of Interior Bd. of Mine Operations Appeals*, 562 F.2d 1260 (D.C. Cir. 1977) ("*District 6*"). According to the court, though *District 6* had held that § 111 "compelled" a no-compensation result unless the mine closure was "*actually* ordered because of" a violation, *District 6* did not necessarily mean that the statute required such a result, but only that the previous court had regarded it as the better reading. *Id.* at 777, App. 8a-9a. The court explained that its departure now from its own precedent was justified by this Court's intervening decision in *Chevron*. The court reasoned that under *Chevron*'s broadened concept of judicial deference, the pre-*Chevron* ruling in *District 6* as to what the statute "compelled" could now properly be read to mean merely that the statute permitted the earlier interpretation but did not require it. 562 F.2d 777-78, App. 8a-9a.

The court separately ruled that, despite § 111's requirement that the miners be "idled by" the order under which they claimed compensation, and despite the fact that the Clinchfield miners were not idled by the § 107 order but by the earlier § 103(k) order, the Commission's compensation award was correct. Finally, the court also affirmed the Commission's conclusion that the miners were entitled to prejudgment interest—even though § 111 does not provide for interest as a remedy. *Id.* at 778, App. 10a.

Clinchfield filed a timely petition for rehearing, as well as a suggestion for rehearing *en banc*, on March 26, 1990. The Court of Appeals denied the petition and suggestion on April 12, 1990. App. 15a-16a.

REASONS FOR ISSUING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE AN IMPORTANT ISSUE INVOLVING THE IMPOSITION OF UNANTICIPATED AND UNWARRANTED LIABILITY, AND TO PREVENT THE MISAPPLICATION OF *CHEVRON* AS AUTHORITY FOR OVERTURNING AGENCY AND JUDICIAL PRECEDENT.

The third sentence of § 111 of the Mine Act contains a drastic remedy that alters the industry practice (as reflected in the governing collective bargaining agreement) of paying wages on an hourly basis only for time actually worked. It requires an operator whose mine is closed by a certain type of federal order, and who thus loses all revenues because of lost production, nonetheless to pay all idled miners for up to an entire week's wages. The drastic nature of the remedy demands that it be construed in accordance with the terms under which Congress made it available, but the decision below does just the opposite, going to great lengths to award compensation even though neither of the two orders that arguably may have idled the miners was issued, as § 111 plainly requires, "for a failure of the operator to comply with any mandatory health or safety standards." 30 U.S.C. § 821 (1982), App. 87a. Indeed, the earlier of those orders—the § 103(k) order that actually stopped the miners from working—is not even included within the statutory provision under which the court ordered compensation.

The D.C. Circuit's imposition of liability is wrong on the merits. It conflicts in principle with a decision by another circuit, ignores the language of the Mine Act, violates cardinal principles of statutory construction adopted by this Court, and improperly imposes a retroactive penalty on Clinchfield. Moreover, by overruling

prior precedent, it undercuts the principles of predictability and finality that undergird our system of laws.[6]

The serious error committed by the court of appeals particularly warrants this Court's intervention, because the error results in part from misapplying this Court's seminal ruling on statutory interpretation in *Chevron*, which delineated a two-step analysis for use "[w]hen a court reviews an agency's construction of the statute which it administers." 467 U.S. at 842. The court below pushed *Chevron* well beyond these limits, using it not only to review the Commission's construction of the Mine Act, but to revisit and overturn the court's own prior, *contrary* interpretation of the compensation provision in *District 6*. In essence, the court below rewrote the precise holding of its own precedent to overrule a decision predicated *not* (as it claimed) on concepts of judicial deference outmoded by *Chevron*, but on the mandate of Congress expressed in the language and legislative history of the statute itself.[7] Review of the decision below is required to preserve the doctrine of *stare decisis* from erosion by the misapplication of *Chevron*, and to pre-

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[6] The Chairman of the Administrative Conference of the United States recently observed that:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities, this means that the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

Breger, *Notes from the Chairman*, Admin. Conf. News, Fall 1989, at 2 (quoting Austrian economist Friedrich Von Hayek).

[7] The court's reversal is particularly noteworthy because the same private party that failed to convince the court in 1977 that the language of § 111 should yield to the Act's broad purposes—the UMWA—has now succeeded in this case.

serve with it the public's ability to rely on established judicial interpretations of statutes.

A. The Decision Below Conflicts with the Plain Meaning of Section 111 of the Mine Act.

The third sentence of § 111 of the Mine Act requires an operator to pay one week's compensation to miners idled "by an order issued under § 104 . . . or § 107 of this title for a failure of the operator to comply with any mandatory health or safety standards." 30 U.S.C. § 821 (1982), App. 87a. This language is straightforward. It ties the idling of miners to the issuance of an order under § 104 or § 107 of the Mine Act, with the further requirement that the order be issued for a failure of the operator to comply with a mandatory health or safety standard. The latter is a significant precondition, for a § 107 order is triggered by a finding that "an imminent danger exists," irrespective of whether the operator may have violated a health or safety standard; such an order can, but need not, identify one or more causative violations cited in concurrent citations issued "under section 814." 30 U.S.C. § 817(a) (1982), App. 86a. By requiring compensation only in situations in which miners are idled due to an order issued for a violation of a health or safety standard, the third sentence of § 111 signals Congress's intention not to impose the drastic remedy of a full week's compensation unless the order charges a violation.[8]

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[8] This remedy is in sharp contrast to the first two sentences of § 111, which require the operator to compensate idled miners for the balance of their shift if the mine is closed by any order issued under § 103, § 104, or § 107, even if it was not issued for a violation. That limited compensation must be paid "*regardless* of the result of any review of such order," 30 U.S.C. § 821 (1982), App. 86a-87a (emphasis added), and has been paid by Clinchfield. But the very absence of qualifications in the first two sentences of § 111 underscores the need to honor the qualifications Congress identified in the third sentence as predicates for the substantially greater liability of a full week's compensation.

A tide of agency and judicial precedent beginning in 1971 had consistently held that the language Congress adopted meant just what it said. The week's compensation remedy, numerous cases ruled, is limited to closures *actually ordered* because of violations of health or safety standards, and does *not* extend to closures ordered because of an imminent danger when later investigation results in a finding that violations may have caused the imminent danger:

(1) In *District 6*, the D.C. Circuit *rejected* the very contention the Commission upheld in this case—that findings in a subsequent investigation can somehow support a week's compensation. The court held that the Coal Act's language and legislative history, which it analyzed in detail, "compel" a reading of § 111's materially identical predecessor provision in its "literal sense" to afford extra compensation only when the mine is closed by an order actually issued for the identified violations. *Id.* at 1266 (discussing H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 2578, 2588).[9]

(2) The Third Circuit reached the same conclusion. In *Rushton Mining Co. v. Morton*, 520 F.2d 716, 719-20 (3d Cir. 1975), it construed "for" to refer to the text of the order, and thus noted that the order must itself contain the necessary findings to support a compensation award.

(3) The Commission's predecessor agency, the Interior Board of Mine Operations Appeals ("Board"), had

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[9] The court in *District 6* had construed § 111's predecessor, § 110(a) of the Coal Act, App. 88a. Section 110(a) predicated liability for a week's compensation on closure by an order issued "for an unwarrantable failure" of the operator to comply with any health or safety standards. In § 111 of the Mine Act, Congress substituted "a failure" for "an unwarrantable failure," but as the court below correctly observed, "the old version did not differ with respect to the critical language." *Clinchfield Coal*, 895 F.2d at 777, App. 8a.

long since adopted the same approach as *District 6* and *Rushton*.[10]

(4) Only two years ago, the D.C. Circuit expressly reaffirmed its holding in *District 6*. *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 80 n.5 (D.C. Cir. 1988).[11]

In the face of the statute's specific language, and consistent precedent on which Clinchfield relied,[12] the Com-

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[10] *See UMWA v. Consolidation Coal Co.*, 8 I.B.M.A. 1, 1 Mine Safety & Health Cas. (BNA) 1532, 1535 (1977) (compensation is to be determined "under the terms of the closure order *as issued*") (emphasis added). *Accord Hatfield v. Southern Ohio Coal Co.*, 4 I.B.M.A. 259, 1 Mine Safety & Health Cas. (BNA) 1301 (1975), *aff'd sub nom. District 6, UMWA v. United States Dep't of Interior Bd. of Mine Operations Appeals*, 562 F.2d 1260 (D.C. Cir. 1977); *UMWA v. Clinchfield Coal Co.*, 1 I.B.M.A. 31, 1 Mine Safety & Health Cas. (BNA) 1010 (1971).

[11] The court in that case addressed the question whether a mine owner was liable under § 111 when the closure order cited only the independent contractor operating the mine, and not the mine owner. In reversing the Commission, the court stated:

> Some of the language in the penultimate paragraph of the opinion could be read . . . to suggest a role for the Administrative Law Judge in the section 111 compensation proceeding in determining whether the cited operator was alone responsible for the underlying violation. *Such an interpretation would be in tension with this court's holding (in a case under the Coal Act) that a compensation order could be based only on the withdrawal order "as issued," and not on the underlying facts which might have justified a broader order. District 6, UMWA v. Department of the Interior Board of Mine Operations Appeals*, 562 F.2d 1260, 1263 (D.C. Cir. 1977).

840 F.2d at 80 n.5 (emphasis added).

[12] While recognizing that the Commission had committed an "about-face" from prior precedent to impose new liability on Clinchfield, 895 F.2d at 778, App. 9a, the court ignored Clinchfield's argument that the Commission violated well-settled principles safeguarding against improper retroactive application of new agency policy. *See, e.g., International Union of Elec. Workers v. NLRB*, 727 F.2d 1184, 1194 (D.C. Cir. 1984).

mission cast aside both language and precedent, and reversed its prior position. It did so by violating three separate rules of statutory construction. The D.C. Circuit, in upholding the Commission, ignored Clinchfield's arguments that the Commission had discarded important canons of statutory interpretation in order to engage in result-oriented decisionmaking.

The Commission's analysis was flawed from the start because it was based on the assumption that liability for compensation should be "viewed in the proper context of Section 111 as a purposive whole." *UMWA v. Westmoreland Coal Co.*, 8 F.M.S.H.R.C. 1317, 1323 (1986), App. 57a, 65a, *incorporated by reference in Clinchfield*, 8 F.M.S.H.R.C. at 1311, App. 5a. This Court, however, has long rejected just such use of general legislative purposes to override a statute's plain meaning:

> The "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. . . . Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise, and, in the end, prevents the effectuation of congressional intent.
>
> . . . The statute may be imperfect, but the [agency] has no power to correct flaws that it perceives in the statute it is empowered to administer.

Board of Governors of Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986) (citation omitted).[13]

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[13] The court's willingness to tolerate the Commission's elevation of general purposes above plain language is all the more puzzling, because the D.C. Circuit, in *other* cases construing the Mine Act, has followed this Court's instruction that general purposes cannot

The Commission also sidestepped the fact that Congress had reenacted the compensation provision without relevant change, *after* the D.C. Circuit's and Third Circuit's decisions in *District 6* and *Rushton*.[14] When courts or agencies adopt a specific interpretation of a statute, and Congress subsequently reenacts the statutory language on which the interpretation was based, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted). The facts cannot be squared with the Commission's new position. Again, however, the court of appeals let this error slip by unaddressed.

Besides conflicting with *Dimension Financial* and *Lorillard*, the Commission's and the court's rulings below are also at odds with another of this Court's tenets of statutory construction:

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alter the clear meaning of the statute. *See, e.g., International Union, UMWA v. MSHA*, 823 F.2d 608, 617 (D.C. Cir. 1987) (MSHA's regulation granting interim relief from mandatory standard pending action on petition for modification of standard "is not related to, and does not take account of, this clear language [of the statute] in any respect"); *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1149 (D.C. Cir. 1987) (although overall purpose of Mine Act is to protect miners, that purpose did not justify MSHA's broad interpretation of "miner" to trigger antidiscrimination provisions of § 105(c) of Mine Act; remedial purpose of Act does not allow MSHA to read into Act a right not provided by Congress).

[14] *See supra* note 9. In amending the Coal Act, Congress showed its familiarity with the agency's interpretations of the Act, and, where it wanted those interpretations to be revised under the Mine Act, it said so. *See, e.g.*, S. Rep. No. 181, 95th Cong., 1st Sess. 31 (1977) (criticizing the Board for having "taken as unnecessarily and improperly strict view" of the requirements for issuing a closure order under the 1969 Act, and discussing several Board decisions). In contrast, Congress expressed no disagreement with the Board's interpretation of the compensation provision.

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983) (citations omitted). The court below could not have ruled as it did without turning its back on this doctrine. If Congress had intended to premise one-week compensation on a "causal nexus" between the closure order and the violation, as the court below concluded, *see* 895 F.2d at 775, App. 4a, it could have listed § 103 orders (which do not cite violations) and *all* § 107 orders (rather than just those issued "for a violation") as triggering compensation so long as some link existed between the order and any subsequently discovered violation. Notably, however, Congress did not include § 103 orders in the third sentence of § 111, nor did it provide one-week compensation for § 107 orders not issued for violations, in contrast to the first sentence of § 111, which expressly predicates lesser compensation on those kinds of orders without qualification. The common theme underlying these two "omissions" is evident: Congress did not intend to impose third sentence liability on an operator where (as in this case) the closure order did not allege a violation on the part of the operator.[15]

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[15] The Commission's and the D.C. Circuit's disregard for this Court's teachings on statutory construction is evidenced by their incorrect resolution of other issues.

First, they ruled that the miners were "idled" by the § 107 order as well as by the § 103 order, even though it was the § 103 order, *not* the later-issued § 107 order, that in fact idled the miners and defined the period of idlement. *Clinchfield Coal*, 895 F.2d at 775, App. 3a-4a. The court's result-oriented decisionmaking necessitated this ruling because a § 103 order, unlike a § 107 order, cannot support awarding one-week compensation under § 111.

Second, the court and the Commission invoked the general purposes of the Act to require the payment of prejudgment interest on § 111 compensation, even though § 111 contains no provision allow-

If allowed to stand, the Commission's new interpretation will have two significant and potentially serious consequences for both miners and operators. First, as the court explained in *District 6*, it will give MSHA inspectors pause before issuing *any* § 107 imminent danger orders, knowing that as a consequence of any such order the operator may be exposed to one-week compensation liability even though no violations of health or safety standards are alleged. *District 6*, 562 F.2d at 1267. In now ignoring this consequence, the court and the Commission have confused the Mine Act's primary goal—the health and safety of the miner, 30 U.S.C. § 801(a), which would necessitate an *immediate* withdrawal order in the face of an imminent danger—with the more limited and subordinate goal of § 111, which is to eliminate the chilling effect that a prospective closure order and loss of wages might have on the reporting of violations by the miners or inspectors. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 47 (1977) (§ 111 removes inhibition on inspectors in issuing closure orders); *Rushton*, 520 F.2d at 720 (§ 111's predecessor encourages miners to report violations by giving them compensation).

Besides giving the inspector cause to delay issuing an immediate closure order in situations involving imminent danger, the new interpretation promotes litigation at the expense of miner safety. It encourages challenges to § 107 orders because operators, no longer able to rely on the orders as issued, will face the risk of retroactive im-

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ing interest. Section 111's lack of an interest remedy should have been held purposeful, because, while leaving § 111 unchanged in 1977, Congress *added* an interest remedy to a different liability provision of the Mine Act, § 105(c). That provision allows miners who have been discriminated against to recover back pay *plus interest*; § 111 allows no such interest. Congress's inclusion of an interest remedy in one provision and omission of it in another provision should have led the Commission and the court of appeals to reject the miners' claim for prejudgment interest. Instead, they read interest into the Act, once again violating the teachings of *Russello v. United States*, *supra*, and other rulings of this Court.

position of compensation liability any time an imminent danger order is issued. Under the rulings below, the termination of the order means nothing, because the order can be effectively rewritten months later, as it was in this case, to impose liabilities that the operator reasonably thought he had not incurred.[16]

B. The Decision Below Misuses this Court's Ruling in *Chevron* to Violate Principles of *Stare Decisis*.

The decision below not only upsets the Mine Act's orderly scheme for compensating idled miners, but subverts the bedrock principle of *stare decisis* on which our system of jurisprudence stands. *See Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983) ("*stare decisis* . . . is a doctrine that demands respect in a society governed by the rule of law").

The court below acknowledged that *District 6* had interpreted the same key language, noting that the critical terms in the compensation provision were unchanged when the 1969 Coal Act was transformed into the 1977 Mine Act. It also candidly admitted the obstacle *District 6* raised against upholding the Commission: "The rub is that the *District 6* court did not view the Commission's prior view [which the Commission here reversed] as simply a reasonable reading of an ambiguous statute, but as one 'compell[ed]' by the language and legislative history." 895 F.2d at 777, App. 8a (quoting *District 6*, 562 F.2d at 1266).

Despite this "rub," the court below accepted the very interpretation pressed by the union that it had expressly rejected when the union offered it in *District 6*. In do-

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[16] Contrary to the observation of the court below, 895 F.2d at 776, App. 6a, a literal reading of § 111 need not cause MSHA to rush its investigation or include *pro forma* findings of violation in § 107 orders. Under § 107(d), imminent danger orders may be and in fact often are modified to include violations that are subsequently discovered.

ing so the panel placed itself in flat conflict with a different panel's prior ruling. The court below did not even address the fact that it was also in conflict with the Third Circuit's analysis of the compensation remedy in *Rushton*. Nor did it recognize that its new ruling was squarely in conflict with its own recent decision in *International Union, UMWA v. FMSHRC*, *supra* note 11.

What is so troubling about the decision below is not merely its casual overturning of many years of precedent, but how the court accomplished this. Rather than adhere to its own precedent in *District 6*—precedent that the court below acknowledged it was "not free to alter," 895 F.2d at 777, App. 8a—the court invoked this Court's decision in *Chevron*, a case presenting an entirely different question concerning the reasonableness of a statutory construction by an administrative agency. *Id.* at 777-78, App. 8a. *See Chevron*, 467 U.S. at 840.[17] The court below reasoned that in the pre-*Chevron* era of *District 6*, the court had relied on a "narrower concept of deference than what *Chevron* now plainly requires." 895 F.2d at 777, App. 8a. Thus, when the *District 6* court conducted an extensive review of the language and legislative history of the compensation provision and concluded that a no-compensation result was "compelled" if the closure order did not allege violations of standards, what that court *really* meant (according to the court below) was merely that the Commission's former view was the better one, not that it was compelled by the statute. *Id.* at 777-78, App. 8a-9a.

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[17] The *Chevron* decision could hardly have been clearer in stating the singularity of the question:

> The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

467 U.S. at 840.

This revisionist interpretation of *District 6* is rife with flaws, the most egregious being its misuse of *Chevron* to justify overturning a binding judicial interpretation of the statute.[18] *Chevron* does not empower courts to overturn or ignore binding judicial precedent. Indeed, it does not concern review of judicial decisions at all. Rather, as its familiar two-step analysis makes clear, it creates an analytical framework for use "[w]hen a court reviews an *agency's* construction of the statute which it administers": either (1) the intent of Congress is clear, thus ending the inquiry; or (2) Congress has not addressed the issue, thus necessitating a determination whether the agency's interpretation is based on a "permissible construction of the statute." 467 U.S. at 842-43 (emphasis added). But the flexibility inherent in this standard, while appropriate in an administrative setting where the law must accommodate both specialized agency expertise and policy changes within the executive branch, should not compromise principles of *stare decisis*. Courts, unlike administrative agencies, are charged with final determinations of "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). *See Chevron*, 467 U.S. at 843 n.9 (collecting cases). Those determinations have little value if a court can rewrite them to suit its own particular view of what the law should be.[19] In-

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[18] Reversal of a court of appeals' own precedent requires far more than just the *fiat* of another panel of the same court. *See Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir.), *cert. denied*, 444 U.S. 991 (1979) ("*stare decisis* demands that we abide by a recent decision of one panel of this court *unless the panel has withdrawn the opinion or the court en banc has overruled it*") (emphasis added).

[19] As this Court has explained:

> *Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.

[Continued]

deed, "[i]f the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on [court] decisions and not be needlessly penalized for such reliance." *United States v. Mason*, 412 U.S. 391, 399-400 (1973).

The decision below not only flouts *stare decisis*, but also misreads the *District 6* opinion. The majority opinion in *District 6* reviewed the legislative history of the compensation provision in detail and concluded that a certain interpretation of the statute was mandated by "Congress's choice." Although this interpretation coincided with the agency's view at the time, *District 6* quite clearly did *not* rest on deference to the agency's view, but on its own independent review of the language and legislative history of the statute—a review that was altogether silent on deference to the agency. *See* 562 F.2d at 1264-68.

In short, *District 6* employed a pure "step one" *Chevron* analysis, finding that Congress had specifically addressed the issue,[20] and thus obviating the need to reach the permissibility of the agency's construction at all. Such an analysis of the statute's plain meaning is sufficient now just as it was in *District 6*, for the issue here is the same, as is the operative statutory language. It was only Judge Leventhal's *concurring* opinion in *Dis-*

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[19] [Continued]

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

[20] The court below seemed to confuse this step with a "literal language" analysis, concluding that when statutory language admits of more than one meaning, a court must proceed to step two and defer to permissible agency interpretations. 895 F.2d at 778, App. 9a. But *Chevron* does not demand that the statutory language be *completely* free from ambiguity, only that Congress's intent be clear based on the court's use of "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. That is precisely how the court proceeded in *District 6*, finding no need to resort to what would later become *Chevron* step two.

trict 6 that proceeded to step two to assess the reasonableness of the agency's interpretation. *Id.* at 1268-69 (Leventhal, J., concurring).

In its struggle to overturn *District 6*, the court below substituted the concurrence for the majority opinion, speculating that in the post-*Chevron* era, all three judges in *District 6* would have followed the minority rationale.[21] This argument rests on the faulty premise that the doctrine of judicial deference to reasonable interpretations of administrative agencies was unknown to the judiciary prior to *Chevron*. As the very existence of the concurrence in *District 6* demonstrates, however, that is not the case.[22]

The agency charged with applying the Coal Act found Congress's intent on the requirements for miner compensation to be unambiguous. The *District 6* court did

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[21] The court also cited *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 187 (D.C. Cir. 1988) (*"NRDC"*) as an instance of its use of *Chevron* to "alter the meaning of sister circuits' decisions." 895 F.2d at 778, App. 9a. But that argument is irrelevant to *stare decisis* and misplaced, because the decisions of sister circuits exert no binding effect on the court below. The *NRDC* court simply disagreed with the other circuits—something it was entirely free to do, with or without *Chevron*. *See NRDC*, 859 F.2d at 187.

NRDC hardly warrants misapplying *Chevron* by rewriting *post hoc* a circuit's own precedent, which the court below did in this case, and which goes to the heart of *stare decisis*. Fidelity to *stare decisis* is particularly crucial in the D.C. Circuit, which is the preeminent circuit for judicial review of federal statutes. *See The Contribution of the D.C. Circuit to Administrative Law*, 40 Admin. L. Rev. 507, 508 (1988) (remarks of Chief Judge Wald, noting that in 1986, nearly 30 percent of all the appeals from agency decisions filed in United States Circuit Court were filed in the D.C. Circuit).

[22] Courts have been aware since at least 1921 that an agency construction can be upheld even though the statute might permit other constructions, and even though the court might have reached a different result if the issue initially had arisen in a judical proceeding. *See Chevron*, 467 U.S. at 843 n.11 (citing, *inter alia*, *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921).

not merely defer to the agency's interpretation. Instead, it carefully analyzed the statute and legislative history and found that the Act "compelled" the result that the agency had reached. That determination should not be overturned through the improper application of *Chevron*. *Chevron* in fact commands respect for the *District 6* precedent: "If the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842. The agency and the *District 6* court held years ago that Congress's intent was clear, and that should have been the end of the matter. Yet now the court of appeals has permitted the agency to reverse its own prior interpretation of the same language, and has admittedly revised its own precedent to allow that deference. Its decision is unjust to Clinchfield, which must now bear a substantial and unexpected penalty because of the Commission's about-face.

More fundamentally, however, the court's cavalier treatment of agency and judicial precedent must be foreclosed. If this Court does not prohibit the practice of using *Chevron* to clear the path of problematic precedents and permit agencies to reverse their prior interpretations at will, grave damage will be done to *stare decisis* and to the essential values it protects.

CONCLUSION

Because the decision subordinates the plain language of the Mine Act to its general purposes, conflicts with other of this Court's principles of statutory construction, exposes mining companies to liabilities that Congress never intended to impose, and subverts the principle of *stare decisis* through a misapplication of this Court's decision in *Chevron*, a writ of certiorari should be issued and the decision below should be reversed.

Respectfully submitted,

TIMOTHY M. BIDDLE *
JOHN T. SCOTT, III
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for the Petitioner*

July 11, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 23, 1989 Decided February 9, 1990

No. 88-1873

CLINCHFIELD COAL COMPANY,
Petitioner

v.

FEDERAL MINE SAFETY AND HEALTH COMMISSION,
Respondent

UNITED MINE WORKERS OF AMERICA,
Intervenor

Petition for Review of An Order of the
Federal Mine Safety and Health Review Commission

John T. Scott, III, with whom *Timothy M. Biddle* was on the brief, for petitioner.

Mary Lu Jordan for intervenor.

L. Joseph Ferrara, Federal Mine Safety and Health Review Commission and *Dennis D. Clark*, Counsel, Department of Labor, entered appearances for respondent.

Before: MIKVA, EDWARDS and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: The Federal Mine Safety and Health Review Commission has directed the petitioner, a

coal mine operator, to pay one week's salary, plus interest, to employees idled by a government-ordered shutdown later tied to the operator's health and safety violations. We uphold the Commission's rulings on both liability and interest.

A

Late in the evening of June 21, 1983, an explosion killed seven miners and injured three others at Clinchfield's McClure mine in Dickerson County, Virginia. At 3:42 a.m. on June 22, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a "safety order" under § 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(k) (1986), restricting access to officials and others needed for investigation of the event. Eighteen minutes later, the same inspector issued a "withdrawal order" under § 107(a), 30 U.S.C. § 817(a), which authorizes shutdown of a mine upon discovery of an "imminent danger." MSHA terminated the § 107(a) order on July 18 and the § 103(k) order on August 8, 1983. The mine evidently then resumed full operations. In March 1984, after conducting an investigation, MSHA issued citations to Clinchfield under § 104(d)(1), 30 U.S.C. § 814(d)(1), for several safety violations that it found caused the explosion.

By that time the United Mine Workers had already filed a claim with the Commission under § 111 of the Act, seeking compensation for the idled miners. The third and controlling sentence of § 111 allows compensation of up to one-week's pay:

> If a coal or other mine or area of such mine is closed by an order issued under § 104 [30 U.S.C. § 814] or § 107 [30 U.S.C. § 817] of this title *for a failure of the operator to comply with any mandatory health or safety standards*, all miners who are *idled due to* such order shall be fully compensated after all interested parties are given an opportunity for a public

> hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (1986) (emphasis added). The Commission ruled in favor of the UMW, relying on its reasoning in a similar case decided the same day, *UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317 (1986). It concluded that this "one-week provision of § 111 may apply even where the § 107 order is the sole cause of the mine's closing, so long as the order had a "concurrent" mine-closing effect ("like 'a second padlock on the door' "). Further, even where the § 107 order does not itself allege a safety violation, the Commission will award compensation if violations later cited by MSHA caused the immient danger underlying the § 107 order. *UMWA v. Clinchfield Coal Co.*, 8 FMSHRC 1310 (1986). The parties stipulated the existence of the required causal relation between the violations and the shutdown, and the Commission reaffirmed its initial ruling in later ordering payment of a week's wages, plus interest. *UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (1988). Clinchfield filed a timely appeal.

B

Clinchfield's first objection is that because the mine was initially closed with a § 103 order, the claimants cannot meet § 111's requirements that miners have been "idled due to" a § 104 or § 107 order. This contention we may dismiss out of hand. Except for the eighteen-minute interval separating MSHA action under the two sections, the miners were no less idled by the § 107 order than by the corresponding action under § 103. Perhaps the words could be taken to mean "idled *initially and exclusively* due to" a § 104 or § 107 order. But that is not what the statute says. It is at least ambiguous on the issue, and thus we must uphold the agency's decision so long as we find

it a " 'reasonably defensible' construction[] of the Mine Act." *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53 (D.C. Cir. 1988) (quoting *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988)).

We have no trouble doing so here. No party has adduced any legislative history even arguably constraining the open-ended tenor of the statutory language. Although the contrary conclusion might be defensible, the Commission's ruling seems not only reasonable but in fact the better reading. Where fault is found with the mine operator, workers whose mines are shut under § 103(k) because a danger has already been partly realized (i.e., an accident has happened) should not be any less entitled to a week's pay than those kept home by a danger that is only "imminent" under § 107. But whenever MSHA uses § 103 to take immediate and full control of a mine in emergency circumstances, that is exactly what would result from Clinchfield's view. See *UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1326 & n.4 (1986).

Clinchfield's second obligation is that the § 111 claim must fail because the § 107 order itself specified no safety violation on the mine operator's part. This issue turns on the meaning of "issued . . . *for a failure* of the operator to comply with any mandatory health or safety standards." 30 U.S.C. §821 (emphasis added). The language itself does not settle the matter, as even Clinchfield seems to concede. See Clinchfield Brief 4 ("All it [the UMWA] offers . . . is a dictionary definition of 'for' to mean 'because or by reason of; on account of.' This begs the issue, for the definition *can just as easily be read to mean* that the order must itself allege a violation.") (emphasis added). Nor has any party produced illuminating legislative history.

We can see nothing unreasonable in the Commission's reading of the word "for" to require one-week compensation where there is a "causal nexus" between a § 107(a) withdrawal order and a health or safety violation that is

cited later. As with the concurrent causation issue, Clinchfield's position would work odd results. Mine inspectors have the most difficulty in ascribing responsibility for a hazard where the "imminent danger" required by § 107 has already materialized in an accident. As the Secretary of Labor explained to the Commission as an amicus in this case:

> MSHA often cannot, and should not, specify the operator's violations on a withdrawal order issued immediately following a mine disaster. Most importantly, immediately after the disaster, it frequently is too dangerous for anybody to enter the mine to determine exactly what happened. Further, MSHA usually must devote its resources to rescuing miners and recovering the affected areas of the mine before it can even begin its accident investigation.

Labor Amicus Brief 13, Joint Appendix ("J.A.") 115. Requiring an initial § 107(a) order to specify violations would thus "penalize miners in just those cases where safety violations are so severe that they result in a disaster." *Id.* at 14, J.A. 116. Not only is the Secretary's argument reasonable, but the very fact of the Commission's acting in agreement with the Secretary heightens the deference due the Commission. See *Emerald Mines*, 863 F.2d at 53.

Even where disaster has yet to occur, the Commission's construction of § 111 makes sense. Confining compensation to cases where violations are so obvious as to allow immediate citations might deter miners from reporting imminent dangers, and inspectors from issuing withdrawal orders, where the blame is less apparent. Cf. *Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975) (relying on similar incentive effects on miners and inspectors in construing predecessor to § 111); S. REP. No. 85-181, 95th Cong., 1st Sess. 47 (1977) (noting that § 111 compensation will "remove any possible inhibition on the inspector in the issuance of closure orders"),

reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 635 (1978). Or it might lead inspectors to include *pro forma* findings of violation in withdrawal orders, so as to protect miners' § 111 entitlements even where no citation is then warranted.

Clinchfield might respond that these disincentives are not a serious concern, as a § 107 order can be modified. 30 U.S.C. § 817(d). Thus miners could call attention to ambiguous violations, knowing that if an imminent danger order were issued and later modified to include a finding of violation, they would receive § 111 compensation. But the power to modify evidently ceases after an order has been terminated, see Labor Brief 14 n.10, J.A. 116, so one can readily understand why Clinchfield refrained from making the argument. If this were the only means of awarding compensation in the case of post-order discovery of a violation, MSHA might delay terminations of withdrawal orders in order to be able to modify them in accordance with later findings of violations, increasing operators' shutdown costs.

Petitioner notes that the critical sentence of § 111 allows compensation only after interested parties have been given "an opportunity for a public hearing, which shall be expedited in such cases, and after such [§ 104 or § 107 order] is final." 30 U.S.C. § 821. Its argument is not that the Commission's reliance on a later § 104(d) order deprives it of a hearing on the violation; in fact expedited hearings are available to contest § 104(d) orders. See 30 U.S.C. § 815(d). Rather its argument is that § 111's provision for an expedited hearing is rendered meaningless if § 111 liability is to be based in part on a closure order that does not allege a violation as issued. Congress, the argument implicitly runs, plainly intended a single hearing on the mine-closing order, which would resolve all the issues on which compensation depended and would occur before the order became final.

The Commission did not explicitly respond to this point in its decision (nor does the UMW before us), but we take their reading of § 111 in essence to give a kind of dual meaning to the word "order" in the phrase "idled due to such order." In cases such as Clinchfield's, the operator is entitled to a hearing on the mine-closing order before it becomes final, and to one on the violation order before it becomes final. Once both are complete, compensation is proper.

There is an awkwardness to the Commission's view, both linguistically and practically. Under its bifurcated approach, the mine operator cannot know the full cost of a mine-closing order when it is issued—only that it will trigger compensation *if* it is followed by a safety citation. This might complicate the operator's choice on opposing a mine-closing order in which no violation is cited.

But that complication is not so grave as to undermine the case for the Commission's reading. There is inevitable uncertainty about the cost of a mine-closing order (as its duration cannot be known in advance), so it is not clear that uncertainty about the risk of having to pay one-week compensation will add much. Moreover, because the operator's dilemma will occur in any case where the charge of violation is added more than 30 days after issuance, Clinchfield's view would in many cases frustrate the practical interests mentioned above. A § 107 withdrawal order becomes final 30 days after issuance, even if not yet terminated; later modifications are contested separately. See 30 U.S.C. § 817(e). Thus Clinchfield's argument would defeat § 111 compensation in all cases except those in which an investigation could be wrapped up less than a month after an accident has happened or the imminent danger been discovered. The more severe the disaster, the less likely payment could be made. We therefore think the Commission's understanding a permissible one.

Our finding that the Commission's view was reasonable would be the end of the story were it not for our prior interpretation of the "for a failure" clause. In *District 6, UMWA v. United States Dep't of Interior Bd. of Mine Operations Appeals*, 562 F.2d 1260 (D.C. Cir. 1977), we found that use of these words in § 111's predecessor provision allowed one-week compensation only where a shutdown was "*actually* ordered because of" the type of operator failure then covered, namely "unwarrantable" failures. See *id.* at 1263 (emphasis added); see also *id.* at 1261 n.4 (text of predecessor provision). Although the circumstances in which liability could attach were more limited than they are now, the old version did not differ with respect to the critical language. Thus petitioner argues that under circuit law, which we are not free to alter, the mine-closing order must be one actually prompted by the finding of a violation.

We cannot escape this contention simply by noting that in *District 6* the court merely accepted the Commission's view, which acceptance would be completely consistent with our accepting a different Commission choice among permissible alternatives. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984). The rub is that the *District 6* court did not view the Commission's prior view as simply a reasonable reading of an ambiguous statute, but as one "compell[ed]" by the language and legislative history. See *District 6*, 562 F.2d at 1266.

In doing so, however, this court relied on a narrower concept of judicial deference than what *Chevron* now plainly requires. In his concurrence to *District 6*, Judge Leventhal stated that "[q]uestions of legislative intent require the *courts*, in the last analysis, to reconstruct how the legislature would have decided the specific issue if it had been specifically addressed by the legislature." *Id.* at 1268 (Leventhal, J., concurring) (emphasis added). In light of Judge Leventhal's formula, and the panel opinion's own stated purpose "to determine which interpreta-

tion Congress intended," *id.* at 1265, we take the latter's conclusion that the language and history "compell[ed]" the no-compensation result to mean no more than that the panel regarded it as the better reading. Such a finding is not enough to bind the Commission under *Chevron*. The concept of review invoked by Judge Leventhal overlooked the possibility that Congress meant no more than to allow the agency to select among reasonable interpretations. *Chevron* presumes this to have been the case unless Congress has spoken clearly. See 467 U.S. at 842-44. Thus, while under *District 6* we must assume that the Commission's former view was the better one, that decision is not a finding that Congress clearly resolved the issue, and it leaves the Commission free to choose the other if reasonable. We recently recognized that *Chevron* may alter the meaning of sister circuits' decisions that were based on a broader notion of judicial review, *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 187 (D.C. Cir. 1988), and here it has done so for one of our own.

In fact, *District 6* itself appeared to concede the reasonableness of the result before us, observing that to read § 111's predecessor as allowing payment even in absence of an order specifying violations would not be "completely outside the language of the statute . . . [nor] be inconsistent with some of the general objectives of the Act." See 562 F.2d at 1264-65. Accordingly, affirmance of the Commission is consistent with *District 6*.

Petitioner complains that even if free to choose, the Commission has failed adequately to explain its about-face. But the Commisssion has done so. It noted that in the administrative decision reviewed in *District 6* there was no *agency* action connecting the closure with unwarrantable violations; it now regards the outcome there as having turned on the union's attempted usurpation of the agency's prosecutorial discretion. See *Westmoreland Coal*, 8 FMSHRC at 1328-29 n.5; cf. *International Union*,

UMWA v. FMSHRC, 840 F.2d 77, 84 n.14 (D.C. Cir. 1988) (highlighting *District 6*'s "reject[ion] of the [claimants'] offer to prove" an unwarrantable failure where no such finding was made by the Commission). We would have the same situation here if the UMWA alleged, but MSHA had not found, a connection between the March 1984 citations and the June 1983 explosion. While an explanation asserting the sort of policy analysis on which the Secretary relied might be more compelling, this somewhat narrower view suffices.

C

Although § 111 makes no mention of interest, the Commission awarded claimants prejudgment interest on their compensation. It distilled from *Rodgers v. United States*, 332 U.S. 371 (1947), the general principle that (where legislation does not speak to the issue) the appropriateness of interest on a statutory obligation depends on the purpose of the statute, on whether the obligation is "in the nature of a debt rather than a penalty, and on the interplay of the relative equities involved." See *Clinchfield*, 10 FMSHRC at 1500-01; see also *United States v. United Drill & Tool Corp.*, 183 F.2d 998 (D.C. Cir. 1950). It viewed all three factors as pointing in favor of interest. Clinchfield objects. We do not believe Congress clearly resolved the matter against interest, and, finding the Commission's interpretation a reasonable one, affirm.

The Commission found a statutory purpose to replace miners' wages in full (up to one-week's worth) to include allowance for prejudgment interest, stressing § 111's statement that qualifying miners "shall be fully compensated . . . at their regular rates of pay" for the lesser of the closure or one week. Clinchfield argues that the Commission's reliance on "fully" is misplaced, as well as its reliance on cases allowing interest under any provisions calling for full compensation. See, e.g., *City of Chicago v. United States Dep't of Labor*, 753 F.2d 606 (7th Cir.

1985) (construing Comprehensive Employment and Training Act); *EEOC v. County of Erie*, 751 F.2d 79 (2d Cir. 1984) (Fair Labor Standards Act); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir. 1981) (Veteran Reemployment Rights Act); *Lodges 743 & 1746 v. United Aircraft Corp.*, 543 F.2d 422 (2d Cir. 1975) (National Labor Relations Act). It characterizes § 111 as a carefully tailored measure of loss allocation, as it allows for compensation for no more than a week, even though the mine closure may last much longer. Thus, it seems to say, § 111 compensation is limited to the actual amount that would have appeared on a miner's paycheck.

We find the argument most unpersuasive. It seems obvious that $100 in 1990 is not full compensation for $100 due in 1980. That the compensation is limited to one week affords no reason why it should be incomplete as to that period. Loss-sharing provisions can still require each party to bear in full the portion of the loss with which it is saddled. Thus in *West Virginia v. United States*, 107 S. Ct. 702 (1987), the controlling statute apportioned the costs of disaster relief between state and federal authorities, but, for the particular item in question, provided that certain work should proceed "without charge to the United States." Section 226 of the Disaster Relief Act of 1970, 42 U.S.C. § 4436 (1970 ed.). Despite the overall sharing concept, the Court concluded that "[p]rejudgment interest is an element of complete compensation; fully repaying the Federal Government for any costs of site preparation will further the distribution of the burdens of disaster relief that Congress intended." 107 S. Ct. at 706 (citation and footnote omitted). Denying interest would, moreover, create an incentive for operators to delay proceedings, a matter not only troubling in itself but tending to aggravate the loss inflicted by the denial. We believe the Commission was within its statutory mandate in finding that allowance of interest was appropriate to give miners complete

compensation for the share of the loss imposed by law on the operators.

Clinchfield does not question the Commission's view that the compensation is not a fine or penalty (which would be presumed not to carry interest. see *Rodgers*, 332 U.S. at 374-76), or make any significant contention that the equities cut against inclusion of interest. Its primary remaining argument is an invocation of the doctrine of *expressio unius est exclusio alterius*—explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context. Section 105(c)(2) of the Maine Act was amended in 1977 to expressly provide for "back pay and interest" for miners discriminated against for blowing the whistle on safety violations. 30 U.S.C. § 815(c). Section 111 was also modified in 1977, but makes no mention of prejudgment interest.

The difficulty with the doctrine—and the reason it is not consistently applied, see, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *United States Dep't of Justice v. FLRA*, 727 F.2d 481, 491 (5th Cir. 1984),—is that it disregards several other plausible explanations for an omission. The drafter (here Congress) may simply not have been focussing on the point in the second context; and, where an agency is empowered to administer the statute, Congress may have meant that in the second context the choice should be up to the agency. Indeed, under *Chevron*, 467 U.S. at 842-44, where a court cannot find that Congress clearly resolved an issue, it presumes an intention to allow the agency any reasonable interpretative choice.

The possibilities either of neglect or of implied delegation to the agency grow more likely as the contrasted contexts grow more remote from each other. Though § 105 is related to § 111 in the sense that both provide compensation, the former covers the distinctive problem of the mistreated whistleblower. In amending § 105 in 1977,

Congress in fact evinced a special concern for the completeness of the remedy afforded such a person, whose role may be critical in generating information about violations. See S. REP. No. 95-181, 95th Cong., 1st Sess. 35-37 (1977), *reprinted in* LEGISLATIVE HISTORY 623-25. Clinchfield would obviously have a better case if provision for interest were made elsewhere *within* § 111. Cf. *United States v. Naftalin*, 441 U.S. 768, 771-74 (1979) (comparing subsections of same section). As it is, the interest remedy of § 105 does not itself convince us that Congress "necessarily considered and rejected" it for § 111. See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C. Cir. 1980) (quoting *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973)).

Finally, Clinchfield attacks the rate of interest awarded the miners.[1] Following the practice of the National Labor Relations Board, which in turn follows the statutory provision for interest on underpaid taxes, see 26 U.S.C. § 6621 (1989), the Commission here used the rate on three-year Treasury obligations, rounded to the nearest whole number and adjusted quarterly, plus three percentage points. Here the formula translated into interest varying between 9% and 13%. Clinchfield characterizes this rate as punitive; rather than proposing an alternative interest rate, it suggests adjustment on the basis of the consumer price index, which would give miners compensation for losses through inflation but none for the capacity of wealth to generate more wealth (and lenders' insistence on corresponding compensation), which a market interest rate reflects. See *Association of American Railroads v. ICC*, 846 F.2d 1465, 1474 (D.C. 1988)

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[1] Clinchfield apparently does not contest the date from which the interest was calculated, set by the ALJ at July 13, 1983. See *UMWA v. Clinchfield Coal Co.*, 9 FMSHRC 1276, 1278 (1987) (decision of ALJ Melick); *UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1507 (1988) (characterizing date as "stipulated").

(discussion of inflationary and real components of interest rate).

We are startled by the claim that the rate is punitive. The government, after all, pays only one percent less on *overpaid* taxes; the difference can hardly be said to represent a congressional finding that anyone underpaying his taxes is reprehensible or is to be punished for the oversight. Truly punitive rates—ones unrelated to any real costs of the use of money—are reserved for special offenders, such as those who fail without reasonable cause to file their tax returns at all. See 26 U.S.C. § 6651(a)(1) (1989) (imposing interest of 5% per month, not to exceed 25% in aggregate, in addition to ordinary underpayment interest and other penalties). Clinchfield appears to believe that the 3%-plus feature must as a matter of logic have rested on a punitive purpose, but we should think it readily attributable to the greater insecurity of loans to persons other than the federal government. And while Clinchfield complains of the Commission's lack of record evidence, we think that dispensable where it has chosen a congressionally determined figure for a seemingly comparable situation. The two situations vary, of course, but we see no reason to think that the Commission's neglect of the differences has hurt Clinchfield; it makes no claim that coal miners enjoy especially favorable borrowing costs.

* * *

Finding each of the Commission's interpretations of the Mine Act not barred by any clear congressional determination to the contrary, and themselves reasonable, we affirm its decision.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1873

CLINCHFIELD COAL COMPANY,
Petitioner

v.

FEDERAL MINE SAFETY AND HEALTH COMMISSION,
Respondent

Before: Mikva, Edwards and Williams, Circuit Judges

ORDER

[Filed Apr. 12, 1990]

Upon consideration of Petitioner's Petition for Rehearing, filed March 26, 1990, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1873

CLINCHFIELD COAL COMPANY,
Petitioner

v.

FEDERAL MINE SAFETY AND HEALTH COMMISSION,
Respondent

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle and Thomas, Circuit Judges.

ORDER

[Filed Apr. 12, 1990]

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

November 28, 1988

Docket No. VA 83-55-C

LOCAL UNION 2274, DISTRICT 28,
UNITED MINE WORKERS OF AMERICA

v.

CLINCHFIELD COAL COMPANY

Before: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1982) ("Mine Act" or "Act"). We previously remanded this matter for further proceedings to determine whether a causal nexus existed between an imminent danger withdrawal order and violations of mandatory standards and, if such a nexus were found, to award specific sums of compensation due miners idled by that order. 8 FMSHRC 1310 (September 1986). On remand, the parties stipulated that such a nexus existed and Commission Administrative Law Judge Gary Melick awarded

compensation including prejudgment interest but denied the claim of complainant United Mine Workers of America ("UMWA") for attorney's fees and costs. 9 FMSHRC 1276 (July 1987) (ALJ). We granted petitions for discretionary review filed by both parties. For the reasons that follow, we affirm the judge's award of prejudgment interest on the compensation due and his denial of attorney's fees and costs. We further announce a modification in the method of calculating interest in both compensation and discrimination cases arising under the Mine Act.

I.

Factual and Procedural Background

The compensation claim at issue arose following an underground explosion of June 21, 1983, at the McClure No. 1 underground coal mine of Clinchfield Coal Company ("Clinchfield") located in Dickerson County, Virginia. On the morning of June 22, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Clinchfield a withdrawal order, pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k), affecting the entire mine. Later that same morning, the inspector issued to Clinchfield an imminent danger withdrawal order, under section 107(a) of the Act, 30 U.S.C. § 817(a), also affecting the entire mine. The imminent danger order was terminated on July 18, 1983, and on September 30, 1983, the UMWA filed a complaint for one-week compensation pursuant to the third sentence of section 111 of the Act on behalf of the miners idled due to the imminent danger order.[1]

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[1] In relevant part, section 111 of the Act, as codified, provides:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section [104], or section [107] all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compen-

On March 26, 1984, MSHA issued to Clinchfield one citation and four withdrawal orders pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), three of which alleged that the cited violations had resulted in a methane ignition causing the June 21 explosion at the McClure No. 1 Mine.

In a summary decision issued on July 23, 1984, the Commission administrative law judge originally assigned to hear the case denied the UMWA's compensation claim. 6 FMSHRC 1782 (July 1984) (ALJ). Despite taking official notice of MSHA's accident investigation report, he regarded as decisive MSHA's failure to actually modify the imminent danger order to expressly allege a violation of a mandatory standard and, accordingly, dismissed the compensation claim. 6 FMSHRC at 1784. The Commission granted the UMWA's petition for discretionary review.

In our decision reversing the judge, we held that: the initial section 103(k) control order did not preclude MSHA's subsequent issuance of the section 107(a) imminent danger withdrawal order and, for purposes of

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sation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. . . .

30 U.S.C. § 821 (sentence numbers added).

section 111 one-week compensation, the mine was closed "by" and the miners were idled "due to" the imminent danger order; an imminent danger order need not itself allege a violation of a mandatory standard in order to trigger entitlement to one-week compensation; and allegations of violations cited subsequently by MSHA in section 104 citations or orders may supply the required nexus between the imminent danger order and a violation of a mandatory standard. 8 FMSHRC at 1313-14. We noted that Clinchfield had not contested the subsequently issued section 104(d)(1) citation and withdrawal orders and that the UMWA had asserted that the allegations of violation contained therein provided the requisite nexus. 8 FMSHRC at 1314. We remanded for a determination whether such nexus existed and, if so, for award of the specific sums of compensation due the miners idled by the imminent danger order. *Id.*[2]

In subsequent proceedings before Judge Melick, the parties stipulated that "a causal nexus existed between the 107(a) order issued to Clinchfield's McClure No. 1 Mine . . . and a violation of a mandatory standard in the . . . Mine." 9 FMSHRC at 1277.[3] They also stipulated to a list of miners on whose behalf the UMWA was seeking compensation, their rates of pay as of June 23, 1983, and the amount of compensation sought on behalf of each such miner. *Id.* The UMWA further requested interest on the compensation award and also sought attorney's fees and costs. In preservation of its appeal rights, Clinchfield repeated the same legal argu-

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[2] Our *Clinchfield* decision was one of three similar cases issued the same date resolving significant compensation issues. The other two decisions were *Loc. U. 1889, UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317 (September 1986); and *Loc. U. 1609, UMWA v. Greenwich Collieries, Div. of Penn. Mines Corp.*, 8 FMSHRC 1302 (September 1986).

[3] Because the judge who had originally heard the case had retired from the Commission, the case was reassigned on remand.

ments in objecting to compensation that it had raised before the Commission during the preceding review of the case.

The judge rejected Clinchfield's objections to compensation as having been disposed of by our first decision in this matter. 9 FMSHRC at 1277. Based on the parties' stipulations, he found that a causal nexus existed between the imminent danger withdrawal order and an underlying violation of a mandatory standard. 9 FMSHRC at 1276-77. Accordingly, he concluded that the miners on the stipulated list were entitled to the lost wages set forth in the list. Citing *Peabody Coal Co.*, 1 FMSHRC 1785 (November 1979) and *Youngstown Mines Corp.*, 1 FMSHRC 990 (August 1979), cases arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976) (amended 1977) ("the 1969 Coal Act"), he granted the UMWA's request for prejudgment interest on the compensation. *Id.* He ruled that the interest was to be calculated according to the formula established for determining interest on back pay awards in discrimination cases set forth in *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042 (December 1983). *Id.* Finally, relying on *Alyeska Pipeline Service Co. v. The Wilderness Soc.*, 421 U.S. 240 (1975), he denied the UMWA's claims for attorney's fees and costs. *Id.*

Before us the UMWA contests the judge's denial of attorney's fees and costs. The UMWA additionally requests the Commission to modify the method of calculating interest to accord with the revised back pay interest formula of the National Labor Relations Board ("NLRB") announced in *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181, 125 LRRM 1177 (May 28, 1987). Clinchfield reasserts its legal objections to awarding compensation in this matter. It also challenges the judge's award of interest and, in any event, notes that the NLRB's new method of calculating interest has

caused the Commission's *Arkansas-Carbona* formula to become outdated.

II.

Disposition

A. - *Clinchfield's objections to compensation*

Clinchfield has reiterated its basic objections to an award of compensation in this case—that the miners were not idled due to the imminent danger order because the mine had been closed initially by the section 103(k) control order, and that the imminent danger order cannot trigger compensation because it did not allege on its face a violation of a mandatory standard. These same points were raised, considered, and decided adversely to Clinchfield in our first decision. *See* 8 FMSHRC at 1313-14. *See also Westmoreland*, *supra*, 8 FMSHRC at 1323-30. However, in a letter submitted after its brief and served on all parties in this case, Clinchfield asserts that the intervening decision in *Int'l U., UMWA v. FMSHRC*, 840 F.2d 77 (D.C. Cir. 1988), *rev'g Loc. 5817, UMWA v. Mounment Mining Corp., etc.*, 9 FMSHRC 209 (February 1987), supports its argument that an imminent danger order must allege on its face a violation of a mandatory standard in order to initiate an award of one-week compensation. We disagree.

Int'l U., UMWA involved the distinct issue of an owner-operator's liability for compensation based upon a withdrawal order issue to an independent contractor. In reversing a split opinion by the Commission holding that "the 'operator' responsible for the conditions of violations underlying the section 111 claim is the sole operator responsible for compensating the idled miners" (*Monument Mining*, *supra*, 9 FMSHRC at 212), the Court commented upon one of its prior decisions concerning the compensation provisions of the 1969 Coal Act:

> Some of the language in the . . . [Commission's *Monument Mining*] opinion could be read . . . to

> suggest a role for the Administrative Law Judge in the section 111 compensation proceeding in determining whether the cited operator was alone responsible for the underlying violation. Such an interpretation would be in tension with this court's holding (in a case under the Coal Act) that *a compensation order could be based only on the withdrawal order "as issued," and not on the underlying facts which might have justified a broader order. District 6, UMWA v. Department of the Interior Bd. of Mine Operations Appeals*, 562 F.2d 1260, 1263 (D.C. Cir. 1977).

840 F.2d at 80 n.5 (emphasis added). *See also* 840 F.2d at 84 n. 14. The *District 6* decision cited by the court was an opinion under the 1969 Coal Act affirming *Billy F. Hatfield v. Southern Ohio Coal Co.*, 4 IBMA 259 (1975), which we discussed and distinguished in our *Westmoreland* compensation decision. 8 FMSHRC at 1328-29 n.5.

In the *District 6* proceedings, the D.C. Circuit and the Interior Board of Mine Operations Appeals had rejected the UMWA's claim that it should be permitted to allege and prove in a compensation proceeding that an imminent danger withdrawal order was actually based on conditions that justified issuance of a withdrawal order pursuant to 30 U.S.C. § 814(c) (1976) (amended 1977), based on an operator's "unwarrantable failure" to comply with a mandatory health or safety standard. If established, such proof would have supported a claim for one-week compensation. *See* 4 IBMA at 265-69; 562 F.2d at 1263-68.[4] As we explained in *Westmoreland*, we be-

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[4] Under the Coal Act only a withdrawal order based on the operator's unwarrantable failure could trigger entitlement to one-week compensation. *See* 30 U.S.C. § 820(a) (1976) (amended 1977). In contrast, under the third sentence of section 111 of the Mine Act (n.1 *supra*), one-week compensation may be triggered when imminent danger orders are issued under section 107 or withdrawal orders are issued under section 104.

lieve that the holding in *District 6* was based on the conclusion that the UMWA's attempt to prove unwarrantable failure in pursuit of a larger award of compensation improperly usurped the Secretary's enforcement and prosecutory role in issuing appropriate withdrawal orders. 8 FMSHRC at 1328-29 n.5. Here, however, the Secretary as the enforcer of the Act has issued the requisite imminent danger order capable of supporting a one-week compensation claim under section 111 since such order was issued due to Clinchfield's failure to comply with mandatory safety standards. The UMWA has not been attempting to prove "underlying facts which might have justified a broader order" (*Int'l U., UMWA*, *supra*, 840 F.2d at 80 n.5). A *District 6* issue would be posed in this matter if the Secretary had issued only the initial section 103(k) control order and, absent an immient danger order or a section 104 withdrawal order, the UMWA had sought to prove, in pursuit of a one-week compensation claim, that the underlying conditions would have justified issuance of an imminent danger order or a section 104 withdrawal order. Thus, the concerns addressed in *District 6*, and referred to in passing by the court in *Int'l U., UMWA*, are not present here.[5]

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[5] In this proceeding we have permitted the UMWA to attempt to establish a nexus between the issuance of an imminent danger withdrawal order and an underlying violation of a mandatory standard. However, a showing of nexus—since stipulated to by the parties—does not usurp any Secretarial role, because the Secretary fulfilled her role by issuing the imminent danger order and a citation and several withdrawal orders containing allegations of violations of mandatory standards. Section 111 does not require the Secretary to set forth compensation-relevant nexus findings in her withdrawal orders or related enforcement actions. *See Westmoreland*, 8 FMSHRC at 1327-30. As we made clear recently in a similar context, citations and withdrawal orders issued by the Secretary integrally pertain to the Act's enforcement and civil penalty scheme, while the nexus concept referred to herein arises solely in the compensation sphere. *See Loc. U. 2333, UMWA v. Ranger Fuel Corp.*, 10 FMSHRC 612, 620-21 (May 1988). As the D.C. Circuit observed in *Int'l U., UMWA*, the Secretary plays no role in compensation proceedings. 840 F.2d at 81-82 & n.6.

Finally, we reemphasize our view that the argument that a section 107 imminent danger order must allege a violation on its face in order to initiate one-week compensation is at odds with section 111, the purposes of the Act, and the last sentence of section 107(a), 30 U.S.C. § 817(a), which expressly permits the subsequent issuance of a citation for any violation allegedly involved in the imminent danger. *See Westmoreland*, 8 FMSHRC at 1327-28. As was the case in this matter, imminent danger orders are often issued under urgent circumstances. As stated in *Westmoreland*:

> [T]he overriding purpose of an imminent danger order is the *immediate* withdrawal of miners. . . . [D]ue to the dangerous conditions giving rise to the order, inspection or investigation of the area to determine the existence of any underlying violations may be delayed necessarily until long after the order was issued or until the imminent danger no longer exists.

8 FMSHRC at 1328 (emphasis in original).

For the foregoing reasons, and as more fully discussed in our prior decision, we reaffirm our rejection of Clinchfield's objections to one-week compensation in this matter.

B. *Award of attorney's fees and costs*

The UMWA seeks review of the judge's denial of its request for attorney's fees and costs. The judge based his denial on *Alyeska Pipeline*, *supra*, in which the Supreme Court endorsed the "American Rule" that attorney's fees are not ordinarily recoverable by the prevailing party in federal litigation in the absence of statutory authorization. *See* 421 U.S. at 247-71. In decisions issued one month after the judge's decision in this matter, we concluded that private attorney's fees are not awardable under the Mine Act to a complainant who retains private counsel in a discrimination complaint proceeding brought

by the Secetary of Labor on the complainant's behalf pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). *Odell Maggard v. Chaney Creek Coal Corp., etc.*, 9 FMSHRC 1314, 1322-23 (August 1987), *pets. for review filed*, No. 87-1494 (D.C. Cir. September 17 & 21, 1987); *John A. Gilbert v. Sandy Fork Mining Co., Inc.*, 9 FMSHRC 1327, 1339 n.6 (August 1987), *pet. for review filed*, No. 87-1499 (D.C. Cir. September 21, 1987).

We based our attorney's fees holding in *Maggard* and *Gilibert* upon our acquiescence, absent contrary judicial authority, in the Fourth Circuit's decision in *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 643-44 (4th Cir. 1977), reversing the Commission's former policy announced in *Secretary on behalf of Robert A. Ribel v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015, 2021-27 (December 1985). The Fourth Circuit generally founded its rejection of private counsel fees and costs in section 105(c)(2) discrimination proceedings upon *Alyeska Pipeline's* affirmation of the "American Rule." 813 F.2d at 643. The Fourth Circuit discerned no statutory authorization for private counsel fees and costs in connection with a discrimination complaint brought by the Secretary pursuant to section 105(c)(2), and contrasted that situation with section 105(c)'s express allowance of such fees and costs to succcessful complainants in a section 105(c)(3) proceeding. 813 F.2d at 644. Thus, under the "American Rule" applied to the Mine Act as set forth in the Fourth Circuit's *Ribel* decision, attorney's fees are not available to prevailing litigants under the Mine Act, except where the Act specifically authorizes such fees.

Neither section 111 nor any other provision of the Mine Act provides for an award of attorney's fees and costs in compensation proceedings. The Act's legislative history is silent on this subject. In the absence of specific statutory authorization, therefore, we follow the "American Rule" in this context and affirm the judge's disallowance of attorney's fees and costs. *Alyeska Pipeline*,

supra; *Ribel* (4th Cir.), *supra*; *Maggard*, *supra*; and *Gilbert*, *supra*.

C. *Interest issues*

Two major interest issues are presented: whether interest is due on compensation awards under section 111 and, if so, whether prejudgment interest may be allowed; also, if interest is available, how are its rate and amount to be calculated? In cases arising under the Coal Act, the Commission allowed interest on compensation awards, and we perceive no reason to adopt a more restrictive rule under the expanded compensation provisions of the Mine Act.

1. *Interest on compensation awards and prejudgment interest*

With respect to the first issue, interest is the compensation allowed by law on the use or detention of money (*e.g.*, 45 Am. Jur. 2d, Interest and Usury § 1 (1969)), and reflects the value of money over time. Interest is not a penalty but is merely an appropriate recompense for the loss over time of the use of money. *See, e.g., Clark v. Paul Revere Life Ins. Co.*, 417 F.2d 683, 686 (8th Cir. 1969); *United States v. United Drill & Tool Corp.*, 183 F.2d 998, 999 (D.C. Cir. 1950). As we have analogously determined with regard to the Mine Act's anti-discrimination provisions:

> The miner [who has suffered discrimination] has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "[t]he purpose of interest is to compensate the discriminatee for the loss of the use of his or her money." *Florida Steel Corp.*, 231 NLRB 651, 651 (1977).

Arkansas-Carbona, *supra*, 5 FMSHRC at 2050.

Section 111 compensation replaces pay that miners have lost as the result of an idlement attributable to the issuance of withdrawal orders specified in section 111. *See generally Westmoreland*, 8 FMSHRC at 1323-24. See *Int'l U., UMWA*, *supra*, 840 F.2d at 81-82 & n.6; *see also* S. Rep. No. 181, 95th Cong., 1st. Sess. 46-47 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 634-35 (1978) ("*Legis. Hist.*") When miners lose pay because of an idling order, they also lose the use of that pay. Thus, interest on a section 111 award operates to compensate miners for the loss of use of their money over a period of time.

Section 111, like its predecessor, section 110(a) of the Coal Act, 30 U.S.C. § 820(a) (1976) (amended 1977), does not expressly provide for interest on compensation. However, as we recognized in approving interest on compensation awards under the Coal Act, we conclude that interest is implied within section 111's remedial pay protection scheme. *See Youngstown*, *supra*, 1 FMSHRC at 995-96; *Peabody*, *supra*, 1 FMSHRC at 1792. As we observed in *Youngstown*: "It is well settled that the omission of a mention of interest in [federal] statutes which create obligations does not show necessarily a Congressional intent to deny interest." 1 FMSHRC at 996, *quoting Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 729 (6th Cir.), *cert. den.*, 379 U.S. 888 (1964). *See also, e.g., Int'l Bhd. of Operative Potters v. NLRB*, 320 F.2d 757, 760-61 (D.C. Cir. 1963); *United Drill & Tool Corp.*, *supra*, 183 F.2d at 999-1000.

The principle that a federal statutory obligation may bear interest even though the statute makes no provision for it is rooted in *Rodgers v. United States*, 332 U.S. 371, 373-74 (1947). Under *Rodgers*, interest is awardable in such contexts depending upon the purpose of the statute, whether the statutory obligation in question is in the

nature of a debt rather than a penalty, and the interplay of the relative equities involved. 332 U.S. at 373-74. *See also Philip Carey Mfg. Co., supra*, 331 F.2d at 729-30; *United Drill & Tool Corp.*, 183 F.2d at 999.

As emphasized already, the purpose of section 111 compensation is to replace miners' wages lost as a result of idling orders. Accordingly, the obligation to pay this statutory compensation is in the nature of a debt owed by the operator to the miner. Plainly, compensation under section 111 is not a penalty or fine, upon which an award of interest would be improper. *See Rodgers, supra*, 332 U.S. at 37-76; *see also Legis. Hist., supra*, at 634-35. Further, during the period of time that a miner has not been compensated, the operator has retained the use and benefit of that money. As we noted in *Youngstown*:

> It is recognized under our legal system that wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day. . . . Many wage-earners who are deprived of their wages doubtlessly find it necessary to borrow money to sustain themselves and their families, paying rates of interest . . . [to do so].

1 FMSHRC at 996, *quoting Philip Carey Mfg. Co., supra*, 331 F.2d at 730. Thus, we perceive no inequity in requiring a mine operator, liable for section 111 compensation, to repay miners for the time value of their compensable pay. Therefore, we conclude in agreement with the judge that interest may properly be included in a compensation award. *See, e.g., Youngstown, supra*; *Philip Carey Mfg. Co., supra*; *Int'l Bhd. of Operative Potters, supra*; *United Drill & Tool Corp., supra*.[6]

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[6] Courts have allowed interest on a wide variety of federal statutory obligations even though interest was not mentioned in the applicable statutes. For example, such interest has been permitted on: back pay awards under the National Labor Relations Act, 29

We reject Clinchfield's argument that because section 105(c) of the Mine Act refers specifically to an award of interest on back pay and section 111 does not expressly provide for interest, interest is unavailable under the latter provision. In enacting the Mine Act, Congress substantially amended the antidiscrimination provisions of the Coal Act (30 U.S.C. § 820(b) (1976) (amended 1977)) to increase the protection afforded miners and expressly permitted interest on back pay. In section 111 of the Mine Act Congress also expanded the compensation that had been available under section 110(a) of the Coal Act (*see Westmoreland*, 8 FMSHRC at 1324-25, 1328-29 & n.5). Although it did not mention interest in the amended compensation provisions, Congress was addressing two discrete areas of concern in making these revisions. The fact that interest was included in section 105(c) does not necessarily imply its exclusion from section 111—particularly in the context of a remedial health and safety statute. *See, e.g., Herman & McLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Bailey v. Federal Intermediate Credit Bk.*, 788 F.2d 498, 500 (8th

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U.S.C. § 151 *et seq.* (1982) ("NLRA"): *e.g., Philip Carey Mfg. Co.*, 331 F.2d at 729-31; *Int'l Bhd. of Operative Potters*, 320 F.2d at 760-61; *Reserve Supply Corp. of L. I. v. NLRB*, 317 F.2d 785, 789 (2d Cir. 1963); back pay awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982); *e.g., EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 578-79 (6th Cir. 1984); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974); awards for wage violations of Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1982): *e.g., Marshall v. Hope Garcia Lancarte*, 632 F.2d 1196, 1199 (5th Cir. 1980); *Hodgson v. American Can Co.*, 440 F.2d 916, 921-22 (8th Cir. 1971); awards to employees for underpayments by contractors under Walsh-Healey Act, 41 U.S.C. § 35 *et seq.* (1982): *e.g., Mitchell v. Riegel Textile, Inc.*, 259 F.2d 954, 956 (D.C. Cir. 1958); and compensation awards to returning veterans for wrongful refusals to reemploy under the Veterans Reemployment Rights Act, 38 U.S.C. § 2021 *et seq.* (1982), and its statutory predecessors: *e.g., Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir. 1981); *Travis v. Schwartz Mfg. Co.*, 216 F.2d 448, 456 (7th Cir. 1954).

Cir. 1986), *cert. den.*, —— U.S. ——, 55 U.S.L.W. 3287 (U.S. Oct. 20, 1986) (No. 86-318); *Carter v. OWCP*, 751 F.2d 1398, 1401-02 (D.C. Cir. 1985).

It is beyond dispute that section 111 "is remedial in nature and was not intended by Congress to be interpreted and applied narrowly." *Westmoreland*, 8 FMSHRC at 1323. In explicitly recognizing interest on back pay awards under section 105(c), Congress was codifying legal and equitable principles that otherwise would have been implicit (under the *Philip Carey* line of cases referred to above). It would be perverse to conclude that codification of the right to interest in section 105(c) is a repudiation rather than an affirmation of these legal and equitable principles insofar as section 111 is concerned. *See Carter*, *supra*, 751 F.2d at 1402. Further, we find no express indication in the Mine Act's legislative history that Congress considered and intended to exclude interest on compensation or to abrogate the settled doctrine of federal law that interest may be implied under federal statutory provisions dealing with remedial or debtor-creditor relationships. *See, e.g., Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 755-56 & n.2 (7th Cir. 1979).

In this aspect of its position on review, Clinchfield seeks to interpose the maxim of statutory construction that *expressio unios est exclusio alterius* ("the expression of one thing is the exclusion of another"). While we agree that this doctrine often plays a useful role in determining statutory meaning, it is nevertheless only an aid to construction and not an invariable rule of law. *See, e.g.*, 2A *Sutherland Statutory Construction* §§ 47.23 & .25 (Sands 4th ed. 1984 rev.); *U.S. Dept. of Justice v. FLRA*, 727 F.2d 481, 491 (5th Cir. 1984). All the interpretative considerations discussed above supporting our recognition of interest in section 111 fairly effectuate the Act. Most importanly, we discern in the remedial structure of section 111 a clear congressional purpose requir-

ing full compensation to idled miners within the framework of that section—a purpose that outweighs application of that particular rule of construction. *See, e.g.*, 2A *Sutherland, supra*, § 47.25; *Carter, supra*, 751 F.2d at 1401-02; *Tri-State Terminals, Inc., supra*, 596 F.2d at 755-56.

The essential reasons underlying our preceding conclusions regarding section 111 interest dictate that it take the form of prejudgment interest accruing from the date that the compensable pay would normally have been paid by the operator until the date that the compensation due is actually tendered. Prejudgment interest is not a penalty but is a necessary element of complete compensation for withheld funds. *E.g., Platora Ltd. v. Unidentified Remains, etc.*, 695 F.2d 893, 906 (5th Cir.), *cert. den.*, 464 U.S. 818 (1983). Indeed, in the absence of compelling equitable considerations to the contrary, prejudgment interest is ordinarily the form of interest awarded on monetary obligations due. *E.g., Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir.), *cert. den.*, 476 U.S. 1142 (1986). As the Supreme Court has explained:

> Prejudgment interest is an element of complete compensation. . . .
>
> * * *
>
> [I]t serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.

West Virginia v. United States, supra, 479 U.S. at 310-11 & n. 2. The cases cited above in n.6 concerning the implication of interest in federal statutes all contemplated generally, or authorized specifically, the award of prejudgment interest. *See, e.g., American Can Co.*, 440 F.2d at 922; *Int'l Bhd. of Operative Potters*, 320 F.2d

at 760-61; *United Drill & Tool Corp.*, 183 F.2d at 999-1000.[7]

Here, from the time of the issuance of the imminent danger withdrawal order, Clinchfield has had the use of the compensable pay at issue. *See, e.g., Stroh Container Co., supra*, 783 F.2d at 752; *American Can Co.*, 440 F.2d at 922. To make the miners whole for the time value of their compensable pay, therefore, we hold in affirmance of the judge that interest is appropriate on sums of compensation due from the date that the compensable pay would have been paid out but for the idlement until the date that the compensation due is tendered. This result comports with the interest approach followed in discrimination cases under *Arkansas-Carbona*. 5 FMSHRC at 2051-53 & n.15.

We disagree with Clinchfield's argument that this outcome is harsh or punitive. Prejudgment interest is an accepted component of just and complete compensation. Clinchfield has not demonstrated any special equitable considerations that might justify an exception in this proceeding. While, as Clinchfield points out, this litigation has followed a protracted course, Clinchfield nevertheless has retained the benefit of the money involved throughout that period. Finally, although we do not question Clinchfield's good faith, its good faith does not preclude assessment of prejudgment interest. *E.g., Stroh Container Co., supra*; *American Can Co., supra*.

2. *Rate and computation of interest*

If interest is to be awarded, both parties urge us to cease applying the interest rate formula set forth in *Arkansas-Carbona, supra*. We conclude that there should

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[7] We note that 28 U.S.C. § 1961 (1982), authorizing postjudgment interest on monetary judgments in federal civil cases, does not purport to address the subject of prejudgment interest and does not bar its award in appropriate cases. *E.g., Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir. 1982).

be one interest rate method of computation applicable to both discrimination and compensation cases, and we agree that it is appropriate to modify the interest formula of *Arkansas-Carbona.*

In *Arkansas-Carbona,* we approved simple interest on back pay awards under section 105(c) of the Act to provide miners a "full measure of relief" from illegal discrimination or retaliation. 5 FMSHRC at 2049, 2052. In choosing an appropriate rate of interest, we considered "the potential cost to the miner both as a 'creditor' of the operator, and as a potential borrower from a lending institution under real economic conditions." 5 FMSHRC at 2050. In addition, we endeavored to select an interest rate "flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and on judges. . . ." *Id.* In light of these criteria, we adopted in that case the "adjusted prime rate" announced semi-annually by the Internal Revenue Service ("IRS") under the then applicable version of 26 U.S.C. § 6621 for purposes of fixing interest on overpayment and underpayment of taxes. *Arkansas-Carbona,* 5 FMSHRC at 2050-51.[8] In so doing, we followed the practice of the NLRB, which applied the adjusted prime rate as the interest rate on back pay awards under the NLRA. *See Olympia Medical Corp.,* 250 NLRB 146, 147 (1980); *Florida Steel Corp.,* 231 NLRB 651 (1977). At the same time, we adopted the "quarterly method" of calculating the amount of back pay and interest due. 5 FMSHRC at 2051-54.

The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (1986), however, changed the method by which the IRS computes interest on overpayment and underpayment of taxes, as of January 1, 1987. Use of the

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[8] The adjusted prime rate is a percentage of the average predominant rates quoted by commercial banks to large businesses as determined by the Federal Reserve Board and rounded to the nearest full percent.

adjusted prime rate as determined by the Federal Reserve Board was abandoned, and the IRS now uses the "short-term Federal rate." 26 U.S.C.A. § 6621 (Supp. 1988). This rate is determined by the Secretary of Treasury based on the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less. 26 U.S.C.A. § 1274(d)(1)(C)(i) (Supp. 1988). The short-term Federal rate is determined for the first month in each calendar quarter and applies during the first calendar quarter beginning after such month. 26 U.S.C.A. § 6621(b) (Supp. 1988).[9] These rates are rounded to the nearest full percent. 26 U.S.C.A. § 6621(b)(3) (Supp. 1988). The overpayment interest rate (paid by the IRS on tax refunds) is the short-term Federal rate plus 2 percentage points and the underpayment rate (paid by the taxpayer on additional taxes) is the short-term Federal rate plus 3 percentage points. 26 U.S.C.A. § 6621 (a) (Supp. 1988).

In response to this legislation, the NLRB in May 1987 abandoned its use of the adjusted prime rate and chose the underpayment rate of short-term Federal interest as its interest rate for back pay awards. *New Horizons*, *supra*, 283 NLRB No. 181, 125 LRRM 1177. The NLRB concluded that the short-term Federal rate corresponds to private economic market forces, is subject to periodic adjustment, is relatively easy to administer, and, because the rate is determined on a quarterly basis, mirrors the quarterly method of back pay calculation. 125 LRRM at 1178.

We agree and select the short-term Federal rate applicable to underpayment of taxes as the interest rate compensation awards. The short-term Federal rate, based on average market yields of marketable federal obliga-

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[9] For example, the rate determined in April of a given year applies to the months of July, August and September of that year.

tions, is influenced by private economic market forces, and captures the "economic and market realities" that a remedial interest rate should embody. *Arkansas-Carbona*, 5 FMSHRC at 2050. It is periodically adjusted and responds to changing economic conditions. Since the rate is publicly announced well in advance of the effective date, it also offers reasonable notice to parties and our judges and would be relatively easy to administer. Finally, the underpayment rate is reflective of the cost to miners of borrowing money when deprived of a paycheck and, therefore, tends to compensate them more fully for their potential losses as borrowers. *See Arkansas-Carbona, supra*; *Youngstown Mines*, 1 FMSHRC at 996.

We note that these same considerations apply with equal force to the award of back pay under section 105 (c) of the Act, the context in which *Arkansas-Carbona* was decided. For that reason, and to enhance the efficiency of the administration of the remedial aspects of the Act, we adopt, for all cases in which decisions are issued after the date of this opinion, the short-term underpayment rate as the interest rate on both compensation and discrimination awards. Because there would have been no major differences between the adjusted prime rate approved in *Arkansas-Carboina* and the short-term Federal underpayment rate since January 1987, we exercise our discretion to apply the short-term rate retroactively to January 1987. *Cf. New Horizons*, 125 LRRM at 1178.

The applicable interest rates with their corresponding daily rates for back pay and compensation awards from January 1, 1978, through December 31, 1988, are as follows:

January 1, 1978 to December 31, 1979...6% (.0001666 per day)
January 1, 1980 to December 31, 1981..12% (.0003333 per day)
January 1, 1982 to December 31, 1982..20% (.0005555 per day)
January 1, 1983 to June 30, 1983.....16% (.0004444 per day)
July 1, 1983 to December 31, 1984....11% (.0003055 per day)

January 1, 1985 to June 30, 1985.....13% (.0003611 per day)
July 1, 1985 to December 31, 1985.....11% (.0003055 per day)
January 1, 1986 to June 30, 1986.....10% (.0002777 per day)
July 1, 1986 to September 30, 1987.....9% (.0002500 per day)
October 1, 1987 to December 31, 1987..10% (.0002777 per day)
January 1, 1988 to March 31, 1988....11% (.0003055 per day)
April 1, 1988 to September 30, 1988....10% (.0002777 per day)
October 1, 1988 to December 31, 1988..11% (.0003055 per day)[10]

As to the computation of interest awards, the *Arkansas-Carbona* quarterly method has stood the test of time since its announcement in 1983. 5 FMSHRC at 2051-54. Therefore, we retain the quarterly method of remedial award computation based on use of the four calendar quarters and substitute the short-term Federal underpayment rates for the adjusted prime rates from January 1, 1987, forward. For purposes of calculating such awards in the compensation sphere, the explanation and computational example provided in *Arkansas-Carbona* (5 FMSHRC at 2051-54) supply the needed guidance and are incorporated herein by reference.[11]

III.

Conclusion

For the foregoing reasons, we affirm the judge's award of compensation, his disallowance of attorney's fees and costs, and his award of prejudgment interest on the

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[10] It is necessary to convert the interest rates announced by the IRS to daily rates ("daily interest factors") in order to calculate interest on periods of less than one year. *See Arkansas-Carbona*, 5 FMSHRC at 2051, 2052-53.

[11] A *Federal Register* notice summarizing this interest calculation holding will be published. In the future the Commission's Executive Director will timely forward to the Commission's Chief Administrative Law Judge, for dissemination to our judges, appropriate updated lists of the applicable interest rates and the daily interest factors. The public may also obtain the lists of relevant interest rates by submitting written requests addressed to the Commission's Executive Director, 1730 K St., N.W., Washington, D.C. 20006.

compensation due. As announced herein, however, we modify the *Arkansa-Carbona* interest computation formula by adopting the short-term Federal underpayment rate as the interest rate applicable to both compensation and back pay awards, effective as of January 1, 1987. Accordingly, Clinchfield is directed to pay the complainants the stipulated sums of compensation due bearing interest from the stipulated date (9 FMSHRC at 1278-84), as provided for in this decision.[12]

/s/ Richard V. Backley
RICHARD V. BACKLEY
Commissioner

/s/ Joyce A. Doyle
JOYCE A. DOYLE
Commissioner

/s/ James A. Lastowka
JAMES A. LASTOWKA
Commissioner

/s/ L. Clair Nelson
L. CLAIR NELSON
Commissioner

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[12] Chairman Ford did not participate in the consideration or disposition of this matter.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Lessburg Pike
Falls Church, Virginia 22041

July 23, 1987

COMPENSATION PROCEEDING

Docket No. VA 83-55-C

McClure No. 1 Mine

LOCAL UNION 2274, DISTRICT 28,
UNITED MINE WORKERS OF AMERICA (UMWA),
Complainant

v.

CLINCHFIELD COAL COMPANY,
Respondent

DECISION

Before: Judge Gary Melick

This case is before me on remand from the Commission to determine whether certain allegations of violations cited in a section 104(d)(1) citation and three section 104(d)(1) withdrawal orders provide the required nexus between the section 107(a) imminent danger withdrawal order at bar and an underlying violation of a mandatory

standard.[1] The Commission further directed that if such a relationship is found to exist then appropriate action should be given to identify affected miners and determine the amount of compensation due each miner.

In this case the UMWA seeks one-week compensation pursuant to section 111 of the Act for certain miners employed by the Clinchfield Coal Company (Clinchfield) as of June 23, 1983.[2] In conjunction with the motion for summary decision now before me the parties stipulated that "a causal nexus existed between the 107(a) order issued to Clinchfield's McClure No. 1 Mine on June 23, 1983, and a violation of a mandatory standard in the McClure No. 1 Mine." The parties also stipulated to a list of miners on whose behalf the UMWA was seeking compensation, their rates of pay as of June 23, 1983, and the amount of compensation sought on behalf of each of those miners.

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[1] Statutory references herein are to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act". The remand order was based upon the Commission's decision in *Local Union 1889, District 17, UMWA* v. *Westmoreland Coal Company*, 8 FMSHRC 1317 (1986), that a section 107(a) order, whether as issued or subsequently modified, need not itself allege a violation of a mandatory standard in order to trigger entitlement to the one-week compensation provisions under Section 111 of the Act. The Commission also concluded therein that allegations of violations subsequently cited may supply the required nexus under section 111 between the section 107(a) imminent danger order and an underlying violation of a mandatory standard.

[2] Section 111 provides, as relevant hereto, as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

As stated in the UMWA motion, the compensation claim at bar arose following an underground explosion at the McClure No. 1 Mine on June 21, 1983. Subsequently at 4:00 a.m. on June 22, 1983, the Federal Mine Safety and Health Administration (MSHA) issued a Section 107(a) "imminent danger" withdrawal order covering the entire mine. The motion further states that on March 26, 1984, MSHA issued on section 104(d)(1) citation and four section 104(d)(1) withdrawal orders, of which three alleged that the cited violations had resulted in a methane ignition which caused the explosion. Clinchfield did not contest the citations or orders and paid the civil penalties assessed by MHSA. On September 30, 1983, the UMWA filed this claim for one-week compensation under section 111 of the Act.

In its opposition to the motion for summary decision Clinchfield argues that prerequisites for awarding the one-week compensation under section 111 of the Act have not been met. Clinchfield argues that the miners were not "idled by" an order issued "for failure of the operator to comply with any mandatory health or safety standards" as that section requires. Clinchfield observes that this argument has been rejected by the Commission in the September 26, 1986, decision (8 FMSHRC 1310) remanding this case for the instant proceedings but submits the argument to preserve its appeal rights.

Indeed, it is clear that Clinchfield's argument has been rejected by the Commission and within the framework of the stipulations presented herein it is established that the miners at issue were in fact "idled by" an order issued "for a failure of the operator to comply with any mandatory health or safety standard" as required by section 111. The UMWA Motion for Summary Decision is therefore granted. Commission Rule 64, 29 C.F.R. § 2700.64. The miners are accordingly, entitled to one-week compensation under the section 111 of the Act.

The UMWA is also seeking interest on the compensation awarded in these proceedings dating from July 13, 1983. The award of interest is indeed consistent with the decisions of this Commission and the purposes of section 111 of the Act. It is accordingly awarded in this case. *Mine Workers, Local 5869* v. *Youngstown Mine Corporation*, 1 FMSHRC 990 (1979); *Peabody Coal Company* v. *Mine Workers*, 1 FMSHRC 1785 (1979). Such interest shall be calculated in accordance with the formula set forth by the Commission in *Bailey* v. *Arkansas-Carbona Company and Walker*, 5 FMSHRC 2042 (1983). While the UMWA points out that the National Labor Relations Board has recently adopted a revised procedure for computing interest on back pay awards in light of the Tax Reform Act of 1986 (see *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181, (May 28, 1987) this Commission has not adopted the revised formula. The UMWA request for costs and attorneys fees is denied. *Alyeska Pipeline Service Co.* v. *The Wilderness Society et al.*, 421 U.S. 240 (1975).

ORDER

Clinchfield Coal Company is hereby directed to pay the following miners the noted compensation plus interest from July 13, 1983, in accordance with the formula set forth in *Secretary* v. *Arkansas-Carbona Company and Walker*, 5 FMSHRC 2042 (1983):

(8:00 a.m.-4:00 p.m. Shift)

Miner	Compensation
Virgil Lee Fuller	$505.70
Garneth Duty	505.70
Jerry Martin	536.60
Homer Gouge	536.60
Darrel J. McCowan	496.80
Jerry A. Hibbitts	505.70
Billy J. Coffey	491.60
Millard Harris	505.70

Miner	Compensation
Danny McConnell	491.60
Edward M. Miller	536.60
Roger D. Austin	536.60
Kenneth Stacy	536.60
Sherman Matney	499.90
Sammy M. Smith	505.70
Randy Beverly	491.60
James R. Stevens	536.60
Edgar B. Moore	493.90
Bobby Murphy	536.60
Ollie Stanley	536.60
Junior Rainwater	506.60
Richard H. Baker	506.60
Joseph A. Counts	536.60
Robert L. Seitz	505.70
David R. Fuller	493.90
Jimmy L. Honaker	536.60
Harold B. Honaker	493.90
Nancy E. Mullins	505.70
H.D. Vencil	491.60
Dewey E. Stanley	499.45
Carrol Rasnick	499.90
James W. Mullins	493.90
Jerry W. Owens	536.60
Ronald M. Mann	493.90
Kemper Hill, Jr.	493.90
Garnice Hill	536.60
George P. Willis	536.60
Gaye N. Little	499.90
Demus A. Stanley	517.70
Roger L. Bentley	499.90
Kenneth L. Fleming	499.90
Ronald L. Welch	505.70
Randall L. Campbell	493.90
C.E. Edwards	493.90
Fred Allen Mullins	505.70
Bobby A. Wampler	476.90
Billy B. Rose	496.80
Willis D. Rasnake	536.60

Miner	Compensation
Larry G. Woods	536.60
Forgy Ray Pennell	493.90
Lowell Bise	536.80
Randy Smith	505.70
Billy G. Mullins	536.80
Marquis R. Neece	493.90
Michael W. Blackson	536.60
Jerry Deel	505.70
J.C. Vance	493.90
James C. Stanley	536.60
Michael D. Rose	505.70
John B. Yates	505.70
Danny Hughes	493.90
Clint J. Owens	493.90
Jim W. O'Quin	487.70
Trinkle L. O'Quin	505.70
Ron J. Baker	536.60
Raymond K. Breeding	536.60
Paul Owens	493.90
Gary Souleyrette	493.90
Wally V. Kennedy	536.60
Olaf D. Kennedy	536.60
Donald Duncan	536.60
Michael R. Kennedy	462.45
William C. Bolling	505.70
Michael J. Rasnick	493.90
Richard W. Hughes	536.60
Rodney A. Shortt	548.60
Steve L. Hale	496.80
Lee Vern O'Quinn	505.70
William Fletcher	505.70
Samuel J. Clay	321.66
Bobby L. Sykes	505.70
James D. Meade	505.70
Jack D. Yates	491.60
Randall C. Hamilton	491.60
Clifford D. Boyd	505.70
Don B. Hall	536.60
Paris Collins	536.60

Miner	Compensation
Randy Wireman	536.60
Bascome H. Taylor	496.80
Claude Turner, Jr.	536.60
Earl B. Willis	493.90
Larry D. Boyd	536.60
George H. Owens	548.60
Mark Kennedy	516.25
Hobert Taylor, Jr.	552.90
John K. Brooks	493.90
Raymond E. Sykes	536.60
Barry M. Hall	536.60
George P. Thomas	477.15
Norman Lewis	542.60

(4:00 p.m.-Midnight Shift)

Lois Bowman	$505.90
Joseph Brummett	505.90
Gregory Austin	548.60
Ardie E. Phillips	548.60
Teddy Tiller	548.60
Robert N. Phipps	517.70
Freddie J. Fultz	505.90
Lee O. Ratliff	548.60
Danny C. Edwards	505.90
Ricky L. Austin	517.70
Avery Boyd	505.90
Michael James	517.70
Joe Kiser	517.70
Danny R. Mullins	517.70
David S. Yates	517.70
Walter A. Deel	548.60
Paul V. Payne	548.60
Donald Williams	517.70
William C. Jackson	505.90
Henry Larry Phipps	548.60
David L. Stanley	548.60
Gary Lee Moore	548.60
Lonny F. Deel	548.60
Earnest E. McCoy	548.60

Miner	Compensation
Darrell W. Thomas	478.80
Thelma Deel	517.70
Dennis Wagner	548.60
Lenville Mullins	517.70
Randy Breeding	548.60
John Mullins	548.60
Everette Miles	517.70
Kemper Damron	548.60
Earl Turner	548.60
James Stapleton	505.90
Gallie Greene, Jr.	505.90
Evelyn Delaney	517.70
James A. Stanley, Jr.	548.60
Michael Lane	548.60
James W. Hamilton	508.80
A. Paul Blevins	517.70
Urban Bartley	508.80
Ronnie Brown	505.90
Kellis C. Barton	548.60
Kile Spangler	548.60
Robert M. Dixon	548.60
Danny L. Chaffin	508.80
Sarah W. Rose	517.70
Curtis W. Franks	548.60
Jim R. Mullins	219.44
Tim Ruff	517.70
Jason E. McKinney	548.60
Jerry L. Jenkins	508.80
Steve J. Hamilton	517.70
Greg S. Fleming	517.70
Jim R. Hearl	548.60
Bob J. Martin	505.90
James E. Holbrook	548.60
James Wagner	548.60
Abraham P. Stevens	548.60
Victor Wallace	548.60
Randy D. Lane	548.60
Wade P. Mullins	548.60
Herbert Johnson	517.70
William R. Johnson	505.90

(Midnight-8:00 a.m. Shift)

Miner	Compensation
Fred A. Counts	552.60
William F. Hartsock	509.90
Larry L. Fields	509.90
Jerry L. Phillips	509.90
Timothy Jennings	527.60
Greg Phillips	509.90
Glen Meade	552.60
Don C. Bush	512.80
Joseph B. Stanley	552.60
Margaret J. Mullins	509.90
Charles Musick	552.60
Dan Honaker	552.60
Laurence Skidmore	509.90
Bill V. Brooks	552.60
Felix J. Boyd	509.90
Earl Castle, Jr.	249.21
Dan R. Musick	509.20
Carter Harrison	552.60
David Gilmer	552.60
Lisa Dingus	552.60
Charlene Ball	552.60
Sue Ellen Fleming	520.00
Oliver B. Rasnake	552.60
Harold D. Stevens	520.00
Marvin E. Counts	512.60
Gary L. Stallard	552.60
Gary N. Mullins	552.60
Leonard Taylor, Jr.	509.60
Steven Viers	520.00
Ron G. McReynolds	552.60
Ron D. Deel	552.60
Maynard F. Heaton	552.60
Walter L. Browning	552.60
James Gray Puckett	512.80
Thermon H. Powers	509.90
Jim D. Sexton	512.80
Ernie J. Meade	515.90
Robert E. O'Quinn	552.60

Miner	Compensation
Robert C. Bailey	509.90
Clyde Harris	509.90
David L. Stanley	203.96
Bob D. Wolfe	509.90
H. Fayne Rasnick	552.60
Bill R. Robinson	552.60
James Turner	552.60
Jeff H. Greear	552.60
Ted R. Smith	512.80
Tony P. Owens	552.60
Joe F. Harrison	552.60
Jiles R. Branham	552.60
Lacy P. Couch	552.60
Jerry D. Childress	527.60
Irene J. Castle	509.90
Anthony Lynch	509.90
Darrell Perkins	521.60
Lawrence Carico	552.60
Charles R. Senter	509.90
Ramey Presley	506.70
Sam W. C. Hughes	516.32
Harold R. Hall	516.32
Gleason R. Austin	550.56
Bill R. Jessee	534.56
Bill G. Large	534.56
William W. Carty	524.80
Walter R. Owens	524.80
James S. Johnson	524.80
R.R. Trent, Jr.	524.80
Ron G. Arney	524.80
William A. Patton	524.80
Paul V. Kennedy	534.56
Dennis Steffey	550.56
Dennis King	536.80
Harless Mullins	534.56
George J. Hughes	536.80
Jim Edwards	536.80
Wiley R. Compton	536.80
Charles L. Ventro	536.80

Miner	Compensation
Richard Neilson	550.56
John Hobson	536.80
Harry T. Mullins	536.80
G.C. Rasnick	536.80
Glen F. Gillenwater	536.80
Bobby Hawkins	536.80
Benny Vance	536.80
David W. Lee	550.56
Joe Tate	550.56
Ben Collins	550.56
Hermon Brooks	550.56
Jim Martin	550.56
Bill West	524.80
William E. Lester	510.00
Harold A. Vanover	534.56
Barbara A. Artrip	510.28

/s/ Gary Melick
GARY MELICK
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

September 26, 1986

Docket No. VA 83-55-C

LOCAL UNION 2274, DISTRICT 28,
UNITED MINE WORKERS OF AMERICA

v.

CLINCHFIELD COAL COMPANY

Before: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982), the issue presented is whether miners idled following an underground mine explosion are entitled to one-week compensation pursuant to the third sentence of section 111 of the Mine Act.[1] Former

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[1] The first three sentences of section 111 provide:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section [103] . . . section [104] . . . , or

Commission Administrative Law Judge Charles C. Moore, Jr., denied the compensation claim filed by the United Mine Workers of America ("UMWA"), holding that the section 107(a) order of withdrawal that he determined had idled the miners failed to allege, and was not modified to allege, a violation of a mandatory health or safety standard. 6 FMSHRC 1782 (July 1984) (ALJ). In light of our decision this date in *Loc. U. 1889, Dist. 17, UMWA* v. *Westmoreland Coal Co.*, Docket No. WEVA 81-256-C, we reverse and remand.

The compensation claim at issue arose following an underground explosion that occurred at Clinchfield's McClure No. 1 underground coal mine in Dickenson County, Virginia, on June 21, 1983. On the morning of June 22, 1983, at 3:42 a.m., an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Al Castenedo, issued a withdrawal order, pursuant to

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section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] *If a coal or other mine or area of such mine is closed by an order issued under section [104] . . . or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated* after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and *after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. . . .*

30 U.S.C. § 821 (sentence numbers and emphasis added).

section 103(k) of the Mine Act, that affected the entire mine.[2] The withdrawal order stated:

> A fatal mine explosion has occurred in the 2 Left active section. This order is issued to assure the safety of any person in the coal mine until an examination or investigation is made to determine that the mine is safe to work. Only those persons selected from the company, state and miners representatives, officials and other persons who are deemed by MSHA to have information relevant to the investigation may enter or remain in the affected area.

At 4:00 a.m. the same morning, the inspector issued a second withdrawal order. This order, issued pursuant to section 107(a) of the Act, cited the existence of an imminent danger. It also covered the entire mine. The withdrawal order stated:

> A fatal mine explosion has occurred in the 2 Left active section. This order shall remain in effect until

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[2] Section 103(k) states:

> *Safety orders; recovery plans*
>
> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k). Orders issued pursuant to section 103(k) or section 103(j), 30 U.S.C. § 103(j), are commonly referred to as "control orders" since they are the means by which the Secretary may assume initial control of a mine in the event of an accident, in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

all the conditions, practices and causes of the explosion have been corrected.[3]

The section 107(a) imminent danger order was terminated on July 18, 1983, and on September 30, 1983, the UMWA filed its claim for one-week compensation based on the imminent danger withdrawal order and on alleged violations of mandatory standards found by MSHA inspectors during their subsequent investigation of the explosion.

In an unreported order issued on December 16, 1983, the administrative law judge denied Clinchfield's motion to dismiss the UMWA's compensation claim. The judge rejected Clinchfield's argument that the miners already had been idled by the initial section 103 "control" order and, therefore, could not have been idled by the section 107(a) imminent danger order as required under the third sentence of section 111. Noting that compensation under the third sentence of section 111 could be initiated only by an order issued pursuant to sections 104 or 107 of the Mine Act, the judge concluded that the section 103

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[3] Section 107(a) provides:

Procedures to counteract dangerous conditions

(a) *Withdrawal orders*

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104](c) of this [Act], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

order was irrelevant to the UMWA's claim under the third sentence of section 111. He reasoned that the subsequent section 107(a) order was like "a second padlock on the door," which prevented the miners from entering the mine just as the first order had withdrawn them initially. However, the judge concluded that, for purposes of the one-week compensation claim, the idlement must result from "an order *which charges* a violation of the health or safety standards." (Emphasis added.) The judge retained jurisdiction in order to determine "[w]hether MSHA, after completing its investigation can effectively modify the imminent danger order or take some other action which would allow the miners to prevail in this case." [4]

In a summary decision issued July 23, 1984, the judge denied the UMWA's compensation claim. Taking judicial notice of MSHA's official accident investigation report, and expressing surprise that MSHA apparently had given no thought to modifying the section 107(a) order to allege violations of mandatory standards, the judge concluded:

> The mine was closed because an inspector thought an imminent danger existed not because he thought there was "a failure of the operator to comply with any mandatory health or safety standards." The fact that the explosion that led to the order was actually, in accordance with my assumptions, caused by the violations does not affect the fact that the inspector did not issue the order "for a failure of the operator to comply with . . . safety standards."

6 FMSHRC at 1784.

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[4] On March 26, 1984, MSHA issued one section 104(d)(1) citation and four section 104(d)(1) withdrawal orders, three of which alleged that the cited violations had resulted in a methane ignition, which caused the explosion on June 21, 1983, at the McClure mine. Clinchfield did not contest the citation or orders and paid $47,500 in civil penalties. (No issues are presented in this proceeding regarding the validity of the citation or orders.)

We granted the UMWA's petition for discretionary review, permitted the Secretary of Labor to file an *amicus curiae* brief, and heard consolidated oral argument in this matter and two other compensation cases decided this date, *Westmoreland*, *supra*, and *Loc. U. 1609, Dist. 2, UMWA* v. *Greenwich Collieries, Div. of Pennsylvania Mines Corp.*, Docket No. PENN 84-158-C. We now reverse.

In *Westmoreland* we examine thoroughly the language, structure, and purposes of section 111, and its third sentence in particular. The material issues presented in the instant matter are identical to issues resolved in *Westmoreland* and that decision, accordingly, controls our disposition here.

For the reasons stated in *Westmoreland*, slip op. at 7-11, we agree in result with the judge that the initial section 103(k) control order did not preclude, for safety or compensation purposes, the subsequent issuance of the section 107(a) imminent danger withdrawal order. The orders had concurrent operation and effect. For purposes of the third sentence of section 111, the mine was closed by and the miners were idled due to the subsequent section 107(a) order.

Further, for the reasons stated in *Westmoreland*, slip op. at 11-13, we reverse the judge's determination that a section 107(a) order, whether as issued or as subsequently modified, must itself allege a violation of a mandatory standard in order to trigger entitlement to one-week compensation. We conclude, in accordance with *Westmoreland*, that allegations of violation cited subsequently by MSHA may supply the required nexus under section 111 between the section 107(a) imminent danger order and an underlying violation of a mandatory standard. *Westmoreland*, slip op. at 13-14.

As noted above, Clinchfield did not contest the subsequently issued section 104(d)(1) citation and three section 104(d)(1) withdrawal orders. Instead, it paid the

penalties proposed by the Secretary. Both the Secretary and the UMWA have asserted that those allegations of violation cited in the section 104(d) citation and orders supply the required causal nexus between the imminent danger order and an underlying violation for purposes of entitlement to one-week compensation. That question now remains to be determined in this matter.

Accordingly, we remand this proceeding to the Chief Administrative Law Judge for assignment to himself or another Commission administrative law judge to determine whether the violations referenced above provide the required causal nexus between the section 107(a) imminent danger order and an underlying violation of a mandatory standard. If such a relationship is found, the presiding judge shall take appropriate action to identify affected miners and determine the amount of compensation due to each miner.

For the foregoing reasons, the judge's decision is reversed. This matter is remanded to the Chief Judge for further proceedings consistent with this decision.[5]

/s/ Richard V. Backley
RICHARD V. BACKLEY
Commissioner

/s/ Joyce A. Doyle
JOYCE A. DOYLE
Commissioner

/s/ James A. Lastowka
JAMES A. LASTOWKA
Commissioner

/s/ L. Clair Nelson
L. CLAIR NELSON
Commissioner

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[5] Commissioner Ford did not participate in the consideration or disposition of this case.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

September 26, 1986

Docket No. WEVA 8-256-C

LOCAL UNION 1889, DISTRICT 17,
UNITED MINE WORKERS OF AMERICA

v.

WESTMORELAND COAL COMPANY

Before: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982), raises important issues concerning the compensation provisions of section 111 of the Mine Act. 30 U.S.C. § 821.[1] The

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[1] The first four sentences of section 111 provide:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section [103] . . . , section [104] . . . , or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such

United Mine Workers of America ("UMWA" or "Union") seeks compensation from Westmoreland Coal Company ("Westmoreland") pursuant to the third sentence of section 111 for an idlement of miners that the Union seeks to link to an imminent danger withdrawal order issued following an explosion at one of Westmoreland's underground coal mines. Former Commission Administrative Law Judge Richard C. Steffey dismissed the UMWA's compensation complaint, holding that: (1) for purposes of determining entitlement to compensation, the miners in question were not idled by the imminent danger order issued pursuant to section 107(a) of the Act but by a withdrawal order previously issued pursuant to section

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order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] *If a coal or other mine or area of such mine is closed by an order issued under section* [*104*] . . . *or section* [*107*] *of this* [*Act*] *for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated* after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and *after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.* [4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] . . . , section [104] . . . , or section [107] of this [Act], all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. . . .

30 U.S.C. § 821 (sentence numbers and emphasis added).

103(j);[2] (2) even if the miners were idled by the section 107(a) order, that order did not allege nor was it modified to allege a violation of a mandatory health or safety

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[2] Section 103(j) provides:

Accident notification; rescue and recovery activities

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. *In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.*

30 U.S.C. § 813(j) (emphasis added). Orders issued pursuant to section 103(j) or section 103(k), 30 U.S.C. § 813(k), are commonly referred to as "control orders" since, as discussed *infra*, they are the means by which the Secretary may take initial control of a mine in the event of an accident in order to protect lives, initiate rescue and recovery operations, and perserve evidence.

Section 107(a) provides:

Procedures to counteract dangerous conditions

(a) *Withdrawal orders*

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104](c) of this [Act], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

standard, which the judge found was required under the third sentence of section 111; and (3) the violations of mandatory standards alleged in 13 subsequently issued section 104(d)(2) withdrawal orders could not constitute a "nexus" between the section 107(a) order and the violation of a mandatory standard. 6 FMSHRC 2192 (September 1984) (ALJ). For the reasons explained below, we conclude that the judge erred in his resolution of each of these questions and reverse and remand.

I.

Facts and Procedural History

The facts were stipulated by the parties and are set forth in the judge's Second Summary Decision. 6 FMSHRC at 21-94-96. Briefly, an explosion occurred at approximately 3:30 a.m. on November 7, 1980, in Westmoreland's Ferrell No. 17 underground coal mine located in West Virginia. At 7:30 a.m. on November 7, Inspector Eddie White of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a section 103(j) withdrawal order that applied to the entire mine. The section 103(j) order provided:

> An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure, smoke was encountered in the 2-South section. Five employees in the mine could not be accounted for. [The area or equipment involved is] the entire mine. The following persons are permitted to enter the mine: Federal coal mine inspectors, West Virginia Department of Mines coal mine inspectors, responsible company officials, and United Mine Workers of America miner's representatives.

One half-hour later, at 8:00 a.m., Inspector White issued a section 107(a) imminent danger withdrawal order also covering the entire mine. The order, which did not allege

a violation of any mandatory health or safety standard, stated:

> All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

The bodies of the five miners were recovered on November 8, 1980, and the 2-South area of the mine was sealed off. Both withdrawal orders were modified on December 10, 1980, to cover "the seals and areas inby the seals." On July 15, 1982, twenty months after the explosion, MSHA issued 13 section 104(d)(2) withdrawal orders citing violations of mandatory standards based on sworn statements taken during MSHA's investigation of the mine explosion.[3] The section 107(a) order

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[3] Section 104(d) provides:

Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a

was not modified to allege violations of mandatory standards, and was terminated on November 15, 1983.

The litigation of this matter has followed a complicated course. Some of this history is described in the Commission's previous decision (*see infra*), and will not be repeated in full here. On February 5, 1981, the UMWA filed a complaint under section 111 of the Mine Act seeking compensation for the miners' idlement, which the Union attributed to the withdrawal orders issued on November 7 in the aftermath of the mine explosion. The UMWA's complaint, as later amended, sought, among other things, the limited compensation available under the second sentence of section 111 ("shift compensation") for the miners idled on the November 7 day shift, and one week's compensation under the third sentence of section 111 ("one-week compensation") for all of the idled miners.

On April 28, 1982, the judge issued a Summary Decision, in relevant part granting shift compensation for the miners idled on the November 7 day shift but dismissing without prejudice the Union's claim for one-week compensation on the grounds that the section 107(a) order did not allege a violation of a mandatory standard. 4 FMSHRC 773, 776-79, 784-88 (April 1982) (ALJ). The judge noted that there was "nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify [the] outstanding imminent-danger order . . . to

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withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d).

allege one or more violations of the mandatory health and safety standards by Westmoreland." 4 FMSHRC at 789. The judge denied the UMWA's request that he retain jurisdiction of the case and defer final decision pending completion of MSHA's investigation into the causes of the mine explosion. 4 FMSHRC at 788-89. The UMWA filed with the Commission a petition for discretionary review, which was granted on June 6, 1982.

The major question presented on review was whether the judge had erred in not retaining jurisdiction over the one-week compensation claim. The Commission concluded that he had erred, and remanded the case to the judge with instructions to hold the record open to permit the parties to make any appropriate motions or showings upon the completion of MSHA's investigation. *Loc. U. 1889, Dist 17, UMWA* v. *Westmoreland Coal Co.*, 5 FMSHRC 1406, 1410-13 (August 1982). The Commission noted the issuance of the 13 section 104(d)(2) orders in July 1982, but expressed no view at that time as to "whether these thirteen 104(d)(2) orders or any later modification of the 107(a) Order . . . may provide the basis for [one-week] compensation under the third sentence of section 111." 5 FMSHRC at 1413.

In the consolidated notice of contest and civil penalty proceeding involving review of the 13 section 104(d)(2) orders (Docket Nos. WEVA 82-340-R, etc.), Judge Steffey vacated the orders, concluding that they had been improperly issued under section 104(d), but he upheld the assertions of violation underlying the vacated orders. In a later order approving settlement, the judge approved Westmoreland's agreement to pay civil penalties totalling $38,000 for the violations alleged in the 13 vacated section 104(d) orders. 6 FMSHRC 1267 (May 1984) (ALJ).

In his decision on remand from the Commission in the compensation proceeding, the judge again denied the UMWA's claim for one-week compensation. The judge

determined that the miners had been withdrawn by the section 103(j) order, not by the section 107(a) order issued one half-hour later, and that "[t]herefore, UMWA cannot satisfy the first prerequisite under the third sentence of section 111 which requires a showing that miners were withdrawn and idled by the 107(a) order." 6 FMSHRC at 2201. The judge further concluded that even if the miners had been withdrawn by the section 107(a) order, it neither alleged at the time of its issuance, nor had it been modified prior to its termination to allege, a violation of a mandatory standard, another prerequisite, in the judge's view, for one-week compensation under section 111. 6 FMSHRC at 2202. Despite Westmoreland's payment of civil penalties in settlement of the underlying allegations of violation contained in the 13 vacated section 104(d) orders (*supra*), the judge opined that the orders could not "be said to allege violations as part of an imminent danger order because [the section 104(d) orders] could ~~not~~ have been issued in the first sentence without a finding that the violation cited in the order did not cause an imminent danger." *Id.*

We granted the petition for discretionary review filed by the UMWA, and heard consolidated oral argument in this matter and two other similar compensation cases also decided this date, *Loc. U. No. 2274, Dist. 28, UMWA* v. *Clinchfield Coal Co.*, Docket No. VA 83-55-C, and *Loc. U. 1609, Dist. 2, UMWA* v. *Greenwich Collieries, Div. of Pennsylvania Mines Corp.*, Docket No. PENN 84-158-C.

II.

Disposition of Questions Presented

This case presents three major issues: (1) whether the issuance of a section 103(j) order precludes a subsequently issued section 107(a) order from serving as a necessary prerequisite for entitlement to one-week compensation under the third sentence of section 111; (2)

whether a section 107(a) order must allege, or be modified prior to its termination to allege, a violation of a mandatory health or safety standard in order to trigger entitlement to one-week compensation; and (3) whether a subsequent allegation by the Secretary of a violation of a mandatory standard in a separate citation or order may provide the nexus between the issuance of the 107(a) order and an underlying violation.

These questions center around the meaning of a few key words in the third sentence of section 111 (n.1 *supra*): What the the relationships intended by the statutory references to a mine being closed "*by*" a section 104 or 107 order, the miners being idled "*due to*" such an order, and the order itself having been issued "*for*" a violation of a standard? 30 U.S.C. § 821 (emphasis added throughout). In our view, the meaning of these words becomes clear when they are viewed in the proper context of section 111 as a purposive whole.

A. *The sequence of withdrawal orders*

We turn first to the judge's conclusion that the miners had already been idled officially as a result of the prior issuance of the section 103(j) "control" order and, therefore, for purposes of entitlement to one-week compensation, could not have been idled as a result of the subsequent section 107(a) order as required for such entitlement under the third sentence of section 111.

Section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. The key Senate Report on the bill that was enacted as the Mine Act states:

> *Miners['] entitlement resulting from closure orders*
>
> As the Committee has consistently noted, the *primary objective of this Act is to assure the maximum safety and health of miners. For this reason, the bill provides at Section 11[1] that miners who are*

> *withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation* during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside their control. *It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law.* This provision will also remove any possible inhibition on the inspector in the issuance of closure orders.

S. Rep. No. 181, 95th Cong., 1st Sess. 46-47 (1977) ("S. Rep."), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 634-35 (1978) ("*Legis. Hist.*") (emphasis added). As the Commission has stated previously, "Section 111 is designed to promote safety and protect lives. . . ." *Loc. U. No. 781, Dist. 17, UMWA* v. *Eastern Assoc. Coal Corp.*, 3 FSHRMC 1175, 1178 (May 1981). The judge's formalistic emphasis on the sequencing of relevant withdrawal orders and his imputation of preclusive effect to the order issued first in time cannot be squared with the language, structure, and purpose of section 111 and other pertinent provisions of the Mine Act.

We have no difficulty with the proposition that only the specific types of withdrawal orders listed in each of the first four sentences of section 111 may serve as prerequisites for entitlement to the forms of compensation mentioned respectively in those sentences. Nevertheless, the focus of section 111 as a whole is on the *operator's conduct* as to relates to conditions in the mine—not the chronology of the Secretary's official actions in response to mine accidents or emergencies. Moreover, section 111 contemplates in furtherance of safety that section 103

control orders and other relevant withdrawal orders have concurrent, rather than mutually exclusive, operation and effect.

Section 111 creates a graduated scheme of compensation tying enlarged compensatory entitlement to increasingly serious operator conduct. Thus, upon a mine closure and idlement attributable *to the issuance of a section 103, 104, or 107 order*, the limited shift compensation described in the first sentences of section 111 is awardable "regardless of the result of any review of such order. . . ." 30 U.S.C. § 821. If, however, the closure and idlement is attributable to a section 104 or 107 order "issued . . . *for a failure of the operator to comply with any mandatory . . . standard*," the entitlement under the third sentence of section 111 is to one-week compensation. *Id.* Finally, and most seriously, if an operator *fails to comply with a section 103, 104, or 107 order*, the miners who otherwise would have been withdrawn are to be paid the full compensation specified in the fourth sentence of section 111 in addition to their regular pay, until such time as the order is complied with, vacated, or terminated. The primary emphasis that we discern in this scheme is upon what the operator has done, not on any expressed concern over the particular sequencing of the issuance of various types of withdrawal orders by the Secretary.

The decisions of this Commission and the predecessor Interior Board of Mine Operations Appeals ("Board") evidence consistent precedent that a prior idlement of miners, whether occurring as a result of the issuance of of an initial control order or, involuntarily, because of emergency conditions, does not bar miners' entitlement pursuant to a subsequently issued withdrawal order.

Under the analogous compensation provisions of section 110(a) of the 1969 Coal Act, 30 U.S.C. § 801 *et seq.* (1976) (amended 1977), shift compensation was awardable for an idlement attributed to an order issued under section 104 of that Act and one-week compensation was

available if the idlement was attributed to a section 104 (c) withdrawal order issued for an "unwarrantable failure" to comply with a mandatory standard. 30 U.S.C. § 820(a) (1976) (amended 1977). Sections 103(e) & (f) of the 1969 Coal Act, 30 U.S.C. §§ 813(e) & (f) (amended 1977), were the control order provisions analogous to sections 103(j) & (k) of the Mine Act. In interpreting the meaning and interplay of these 1969 Coal Act provisions, in circumstances analogous to the present case, the Board held:

> The miners in the instant case were officially withdrawn by the 103(f) [control] order. However, they were also officially withdrawn by the [subsequent] section 104(c) [unwarrantable failure withdrawal] orders. The language in section 110(a) of the Act allows compensation to miners who are "idled" by a 104(c) order. *There is nothing in the language of that section to indicate that compensation for miners will not lie when there are two different orders of withdrawal in effect concurrently. Additionally, that section does not require the 104 order to be the first official one. Sequence . . . is not the essence of the applicability of section 110(a).*

Roscoe Page v. *Valley Camp Coal Co.*, 6 IBMA 1, 6 (1976) (emphasis added). In addressing similar issues under the 1969 Coal Act, the Commission also adopted the approach that initial control orders and other subsequent compensation-qualifying withdrawal orders operated "concurrently." *Peabody Coal Co., etc.*, 1 FMSHRC 1785, 1790 (November 1979).

In *Loc. U. No. 781, etc.* v. *Eastern, supra*, a compensation case arising under the Mine Act, the Commission applied the concept of "nexus" to determine the causative relationship between the operation of withdrawal orders and idlements. The Commission stated, "[S]ection 111 compensation is awardable only if there is a nexus between a designated withdrawal order and the miners'

idlement . . ., or between the underlying reasons for the idlement . . . and the reasons for the order." 3 FMSHRC at 1178. The Commission defined "nexus" in terms of a "significantly substantial relationship" between idlement and withdrawal order "to support a section 111 award." *Id.* Rather than establishing an inflexible nexus requirement the Commission specifically recognized the possibility of "more complicated sequences of events or *concurrent operation of causative factors.*" *Id.* (Emphasis added.) The Commission held: "In such cases, we will examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the . . . compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself." *Id.* The foregoing principles are determinative of the present issue.

In the present case, the initial section 103(j) control order and the subsequent section 107(a) imminent danger withdrawal order each played a particular role with respect to the overall safety concerns of the Mine Act and section 111 and the compensatory character of section 111. From the standpoint of safety, the section 103 order gave the Secretary immediate control of the mine, under the emergency circumstances of the explosion, in order to take whatever actions he deemed necessary in protecting lives and directing rescue and recovery operations. From a compensatory standpoint, that order (as the judge correctly concluded in his first summary decision) initiated whatever compensation was available under the first two sentences of section 111. The section 107(a) order, issued one half-hour later upon a finding of imminent danger, required the operator, for safety reasons, to withdraw the miners from the affected area until the Secretary determined that the imminent danger and its causes no longer existed. For compensation purposes, the imminent danger order initiated the possibility

of entitlement under the third sentence of section 111. We find nothing in the statute or in its legislative history to suggest that an existing section 103 order precludes the issuance of a valid and effective section 107(a) order either for purposes of mine safety or compensation entitlement under the third sentence of section 111.[4]

We therefore conclude that the chronological sequence in which the section 103 and 107(a) orders were issued is not determinative of the miners' right to compensation under the third sentence of section 111. In light of the graduated compensation scheme of section 111, imputation of preclusive effect to the initial section 103 control order would effectively frustrate the obvious intent of Congress to provide for expanded one-week compensation beyond the more limited shift compensation available under the first two sentences of the section. Stated other-

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[4] In *Roscoe Page, supra,* the Board spoke to similar effect in resolving analogous issues under the 1969 Coal Act:

> Section 103(f) [control orders] and 104(c) [withdrawal] orders are designed to achieve different ends. Clearly, by its own language, section 103(f) operates to provide the inspector with emergency powers in the exigencies of a situation wherein there is a mine accident for the purpose of protecting the health and safety of persons in the coal mine. A section 104(c) order, in addition to protecting the health and safety of miners, operates to provide a sanction for a recalcitrant operator's unwarrantable failure to comply with the mandatory standards found in the Act and regulations. Further, a 104(c) order in combination with section 110(a), operates to provide compensation for miners forced to lose work due to this unwarrantable failure. The sequence of 103(f) and 104 orders bears no relationship to the manner in which sections 104 and 110(a) operate together . . . . [T]he issuance of a 104(c) order, for purposes of section 110(a)[,] has the effect of officially idling the miners even though, in fact . . . they have first withdrawn in compliance with a 103(f) order. Ergo, the miners in this matter were officially "idled" for the purposes of section 110(a) by the 104(c) orders of withdrawal upon their issuance notwithstanding the prior withdrawal required by the 103(f) order.

6 IBMA at 6-7.

wise, we believe that Congress did not intend section 103 control orders, usually issued first in time under exigent circumstances, to have compensation-precluding effects. The focus, as stated above, is upon the conduct of the operator and the conditions in the mine, not the sequencing of MSHA enforcement activity.

The record in this matter is clear that the section 107(a) order was issued as the result of a finding of imminent danger, which required that the miners remain withdrawn until the imminent danger and its causes were determined to no longer exist. We agree with the judge that, for compensation entitlement under the first two sentences of section 111, the mine was closed "by" and the miners officially were idled "due to" the section 103(j) order. We conclude, however, that for compensation purposes under the third sentence of section 111, the mine also was closed "by" and the miners also officially were idled "due to" the section 107(a) imminent danger order of withdrawal. In short, the section 103 and 107 orders operated concurrently. We reverse the judge's findings to the contrary.

B. *The violation of a mandatory standard*

We next address the question of whether, as the judge held, the section 107(a) order itself must allege, or be modified to allege, the violation of a mandatory standard.

The third sentence of section 111 provides that a claim for one-week compensation comes into play when a mine is closed by an order issued under section 104 or section 107 "*for* a failure of the operator to comply with any mandatory health or safety standards." 30 U.S.C. § 821 (emphasis added). The judge adopted a restrictive interpretation of the term "for", holding that the section 107(a) order as issued, or as subsequently modified prior to its termination, must itself allege the violation of a mandatory standard. On review, the UMWA contends that the language and the legislative history of sections 104(a), 107(a) and 111 permit the necessary allegation of violation of a mandatory standard to be cited under

section 104 of the Mine Act independently from, and subsequent to, the issuance of a section 107(a) order. We agree.

The last sentence of section 107(a) (n.2 *supra*) expressly states that the issuance of an order under that subsection "shall not preclude the issuance of a citation under section 104. . . ." 30 U.S.C. § 817(a). The legislative history of section 104(a) recognizes that occasions may occur "where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons." S. Rep. 30, *reprinted in Legis. Hist.* 618. We note also that, as the key Senate Report points out, the overriding purpose of an imminent danger order is the *immediate* withdrawal of miners, and that, due to the dangerous conditions giving rise to the order, inspection or investigation of the area to determine the existence of any underlying violations may be delayed necessarily until long after the order was issued or until the imminent danger no longer exists. S. Rep. 38, *reprinted in Legis. Hist.* 626.

Thus, neither the statute nor the pertinent legislative history requires that for the purpose of one-week compensation the violative conditions causing or underlying the issuance of the section 107(a) order be cited in the order itself or its modification. Although it would have been procedurally possible, once the imminent danger and its causes no longer existed, for the Secretary to have modified the order pursuant to section 107(d), 30 U.S.C. § 817(d), and, upon completion of further investigation, to have cited violations under that modified order, we find no basis to conclude that a separately issued allegation of violation under section 104 is fatally defective in establishing the nexus between the withdrawal order and the violation of a mandatory standard.

We emphasize that section 111 is premised upon a congressional intent to expand rather than contract the compensation that was available under section 110(a) of

the 1969 Coal Act. As noted, under the 1969 Coal Act, one-week compensation was available only for an idlement attributable to an unwarrantable failure order. A broader range of orders may trigger the same entitlement under the Mine Act. Further, the Senate Conference report on the bill that became the Mine Act reflects a broad interpretation of the word "for" by describing one-week compensation as being available "in the event the withdrawal order was *the result of* a failure of the operator to comply with a mandatory health or safety standard. . . ." Conf. Rep. No. 461, 95th Cong., 1st Sess. 59 (1977), *reprinted in Legis. Hist.* 1337 (emphasis added).

Congress could have chosen words restricting the one-week compensation entitlement in section 111 to a designated order of withdrawal that specifically alleged a violation of a mandatory standard, but there is no indication, in the legislative history or in the final language of the section, that it wished to do so. We reverse the judge's holding that violation of a mandatory standard must be alleged in a section 107(a) order or in a modification of such order prior to its termination in order to initiate compensation under the third sentence of section 111.[5]

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[5] We find Westmoreland's reliance on *Billy F. Hatfield* v. *Southern Ohio Coal Co.*, 4 IBMA 259 (1975), *aff'd sub nom. District 6, UMWA* v. *IBMA*, 562 F.2d 1260 (D.C. Cir. 1977), to be misplaced. In *Hatfield*, a case involving a one-week compensation claim under the 1969 Coal Act, the mine had been closed by an imminent danger order of withdrawal issued pursuant to section 104(a) of that Act. 30 U.S.C. § 814(a) (1976) (amended 1977). As already noted, under that statute, only a section 104(c) order of withdrawal for unwarrantable failure could trigger one-week compensation. The UMWA attempted to show that the section 104(a) imminent danger order actually had been based on a condition or practice resulting from the operator's unwarrantable failure to comply with a standard. The court affirmed the decision of the Board that the statute specifically limited one-week compensation to idlements attributable to *orders* issued pursuant to section 104(c). 562 F.2d at 1263-68. In our view, an important fact distinguishing *Hatfield* from the

C. *Violations of standards cited in the section 104(d) orders*

Finally, we turn to the question of whether the allegations of violation of mandatory standards contained in the section 104(d) orders issued to Westmoreland could constitute a nexus with the section 107(a) order for compensation purposes. Although conceding that "several of those orders cite Westmoreland for violations which may have contributed to the explosion" (6 FMSHRC at 2198), the judge nevertheless concluded that those allegations of violation could not be linked to the section 107(a) order.

The UMWA contends that it is irrelevant to the question of compensation that the violations of mandatory standards were cited in section 104(d) orders, because the issue here is not the validity of those *orders* but whether the alleged *violations* were related to the mine explosion that led to the issuance of the section 107(a) order. Westmoreland notes that all of the orders were vacated and that the underlying violations were resolved in a civil penalty settlement. Westmoreland argues that no causal relationship exists between those violations and the section 107(a) order for purposes of the present proceeding.

We conclude that *form* in which the violation of a mandatory standard is cited—whether in a section 104(d) citation or order or in a section 104(a) citation—is *not controlling for compensation purposes.* As the judge correctly recognized in his Decision Approving Settlement, the allegations of violation of mandatory standards cited in the orders survived his vacation of the orders themselves. 6 FMSHRC at 1270. As we have in-

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present issue is that in *Hatfield* the UMWA was attempting to usurp the prosecutory responsibility of the Secretary of the Interior with respect to issuance of a section 104(c) *order*, by alleging and attempting to prove unwarrantable failure, which could trigger compensation if appropriate. In the present case, the Secretary of Labor, as enforcer of the Act, has issued the requisite section 107(a) order capable of initiating one-week compensation and also has issued the underlying necessary allegations of violation.

dicated, the essential question is one of causality, not procedural format: Was the imminent danger order issued because of underlying conditions involving a violation of mandatory standards? We conclude that the allegations of violation of mandatory standards cited in the vacated section 104(d) orders could provide the causal nexus with the section 107(a) withdrawal order as required for compensation under the third sentence of section 111. The judge's settlement decision states that the violations were alleged in 13 withdrawal orders all issued on July 15, 1982, by an MSHA inspector on the basis of his examination of sworn statements obtained by MSHA investigators in December 1980, and pertain to conditions that the inspector found contributed to the mine explosion of November 7, 1980. 6 FMSHRC at 1269, 1270. In the settlement agreement, Westmoreland paid in full the proposed penalty assessments for five violations, and agreed to pay reduced penalties for the other eight violations. 6 FMSHRC at 1270-1274. Westmoreland's payment of civil penalties for these alleged violations established, for purposes of any proceeding under the Mine Act, that those violations of the Act occurred. *See Old Ben Coal Co.*, 7 FMSHRC 205, 209 (February 1985); *Amax Lead Company*, 4 FMSHRC 975, 977-80 (June 1982).

Left unresolved, however, is the specific question of whether any of these charges of violation of mandatory standards in fact provide the necessary relationship to the section 107(a) order so as to initiate compensation under the third sentence of section 111. The judge's decision concerning the civil penalty criteria for each of the subsequently alleged violations concludes only that several of the violations may have contributed directly to the mine explosion, while others probably would not have contributed to the cause of the explosion. 6 FMSHRC at 1270-1274.

Because the relationship or nexus between the violations of mandatory standards and the imminent danger order is the critical issue on which statutory entitlement

to one-week compensation hinges, we remand to the Commission's Chief Administrative Law Judge for further proceedings by him or by another judge. The assigned judge may reopen the record of this proceeding and take whatever further action is deemed necessary to determine whether any of the conditions involved in the violations of mandatory standards were sufficiently related to the mine explosion and the section 107(a) imminent danger order so as to constitute the required causal nexus. If such a relationship is determined, the judge shall take appropriate action to identify the affected miners and the amount of compensation due to each.[6]

III.

Conclusion

For the foregoing reasons, the judge's decision is reversed. This matter is remanded to the Chief Judge for proceedings consistent with this decision.[7]

/s/ Richard V. Backley
RICHARD V. BACKLEY
Commissioner

/s/ Joyce A. Doyle
JOYCE A. DOYLE
Commissioner

/s/ James A. Lastowka
JAMES A. LASTOWKA
Commissioner

/s/ L. Clair Nelson
L. CLAIR NELSON
Commissioner

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[6] This case does not require us to resolve, and we intimate no views as to, issues concerning the technical requirements necessary for issuance of valid section 104(d) orders.

[7] Chairman Ford did not participate in the consideration or disposition of this case.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

July 23, 1984

COMPENSATION PROCEEDING

Docket No. VA 83-55-C

McClure No. 1 Mine

LOCAL UNION 2274, DISTRICT 28,
UNITED MINEWORKERS OF AMERICA,
Complainant

v.

CLINCHFIELD COAL COMPANY,
Respondent

RULING ON MOTION FOR SUMMARY JUDGMENT

Before: Judge Moore

In ruling on a Motion for Summary Decision it is appropriate to view the facts in the light most disfavorable to the moving party. Assumptions I make for the purpose of ruling on this Motion, are therefore not binding regarding any other case that may arise due to the explosion of the McClure No. 1 Mine on June 21, 1983. I am assuming for example that the safety standard violations which MSHA says existed prior to the explosion,

did in fact exist and did lead to the explosion which killed seven miners.

In this action United Mine Workers is seeking one week's compensation for each of the miners idled by the explosion and subsequent orders issued by MSHA. Section 111 of the Federal Mine Safety and Health Act of 1977 provides in part as follows:

> If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Viewed in the light most favorable to the United Mine Workers of America, the events following the explosion were as follows. At 3:42 A.M. on June 22, 1983, an MSHA inspector issued a withdrawal order pursuant to section 103(k) of the Act. At 2:00 P.M. on the same day he issued an imminent danger order pursuant to section 107(a) of the Act. Neither order alleged or referred to a violation of a health or safety standard.

MSHA's comprehensive underground investigation lasted from June 25, 1983 to August 12, 1983, and various interviews were conducted in July and August of that year. According to the accident report, which is not a part of the record in this case but which I nevertheless have, the transcripts of all testimony taken were released to the general public on September 9, 1983. I can not find anything in that accident report, however, that indicates when it was published. In any event it was not until March of 1984 that MSHA issued a section 104(d)

citation and four section 104(d) orders all alleging violations of safety standards that led to the explosion. It is noted that the citation bears the number 2352610 but each of the four orders refers to it as number 2352601. I assume that was a clerical error. The original section 107(a) imminent danger order was not modified.

On December 16, 1983, I denied Clinchfield's original motion for summary decision (I referred to it as a motion to dismiss) relying for the most part on the Commission's decision in *United Mine Workers of America* v. *Westmoreland Coal Company*, 5 FMSHRC, 1406 (August 1983). At that time MSHA had not released its accident report and the posture of the case was thus very similar to the situation before the Commission in the *Westmoreland* case. The Commission remanded the *Westmoreland* case to Judge Steffey with directions that he retain it on his docket until MSHA had completed its investigation and taken whatever action it deemed necessary. The Commission expressed no opinion as to whether MHSA could legally amend the section 107(a) order to allege a violation or whether such an amendment would entitle the miners to the week's compensation involved. It said these questions should be first resolved by the judge after the investigation.

As I have stated previously, the MSHA investigation report is not a part of the official record in this case. It is, however, an official public document of the United States Department of Labor and as such it is entitled to "official notice" status and under the summary decision criteria statements therein detrimental to Clinchfield could be "officially noticed". I am including a copy of that report with the material forwarded to the Commission in this case for whatever use it wishes to make of the report.

After the parties had rebriefed the issues, I asked the Solicitor if it wished to express a view. The Solicitor did write a letter in which it agreed with the United Mine Workers' arguments and stated,

> "as the instant 107(a) order was terminated by the time the accident report was issued, no thought was given to issuing a modification of the terminated order to tie it formally to the 104(d) orders issued with the report."

I would have thought that after the Commission's *Westmoreland* decvision and my ruling herein of December 16, 1983, that some thought would have been given to the question of modification. Clinchfield has moved to strike the Solicitor's letter but inasmuch as I invited the Solicitor's views I can hardly strike his compliance with my request.

The issue before me in this case presents a very close question. I sympathize with the arguments of the United Mine Workers of America and the Solicitor, but I believe that the law is to the contrary. The mine was closed because an inspector thought an imminent danger existed not because he thought there was "a failure of the operator to comply with any mandatory health or safety standards." The fact that the explosion that led to the order was actually, in accordance with my assumptions, caused by the violations does not affect the fact that the inspector did not issue the order "for a failure of the operator to comply with . . . safety standards".

The Motion is GRANTED and the case is DISMISSED.

/s/ Charles C. Moore, Jr.
CHARLES C. MOORE, JR.,
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

December 16, 1983

COMPENSATION PROCEEDING

Docket No: VA 83-55-C

McClure No. 1 Mine

LOCAL UNION 2274, DISTRICT 28,
UNITED MINEWORKERS OF AMERICA,
Complainant

v.

CLINCHFIELD COAL COMPANY,
Respondent

RULING ON MOTION TO DISMISS

An explosion occurred in Clinchfield's McClure No. 1 Mine on June 21, 1983. At 3:42 A.M. on the following day, an MSHA inspector issued a § 103(k) order. A short time later the inspector issued a § 107 imminent danger order. Neither of the two orders alleges a violation of a health and safety standard.

The company argues that inasmuch as the miners were already out of the mine pursuant to the § 103(k) order

they could not have been idled by the § 107 imminent danger order. To prevail in getting the week's pay that the Union is seeking for the miners, it is necessary that the miners be idled by an order issued under either § 104 or 107 and that the order allege a violation of a health or safety standard. The type of compensation that the Act provides for idlement, pursuant to § 103 of the Act is not involved in this case.

In my view the second order was like a second padlock on the door. It kept the miners out of the mine just as much as the first order did. The word "idled" must be interpreted to mean not only the act of leaving a mine but also the condition of being prevented from returning to the mine. As of 2:00 P.M. of June 22, 1983, the imminent danger order prevented the miners from re-entering the mine. Clinchfield's argument regarding this phase of its motion is REJECTED.

In order for the Union to prevail it must show that the miners' idlement was caused by an order which charges a violation of the health or safety standards. The imminent danger order as it stands, does not charge such a violation. Whether MSHA, after completing its investigation, can effectively modify the imminent danger order to take some other action which would allow the miners to prevail in this case, is not something that I am prepared to decide at this time. In United Mine workers of America vs. Westmoreland Coal Company, 5 FMSHRC 1406, (August 1983) the Commission refused to express any opinion on the question. It did, however, remand the case to Judge Steffey with directions that he retain jurisdiction until MSHA had completed its investigation and taken whatever action was necessary. I will be guided by that decision. A newspaper story published on November 21, 1983, stated that the McClure No. 1 Mine is back in operation. I assume therefore, that MSHA will conclude its investigation in the near future,

if it has not already done so. The party who stands to gain from the result of the investigation is directed to inform me of those results.

/s/ Charles C. Moore, Jr.
CHARLES C. MOORE, JR.,
Administrative Law Judge
(703) 756-6236

STATUTORY PROVISIONS

Federal Mine Safety And Health Act of 1977, Sections 103(k), 104(a),(d), 107(a), 111, 30 U.S.C. §§ 813(k), 814(a), (d), 817(a), 821:

§ 813. Inspections, investigations, and recordkeeping

* * * *

(k) Safety orders; recovery plans

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

§ 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with

reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

* * * *

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be wihtdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the

existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

* * * *

§ 817. Procedures to counteract dangerous conditions

(a) Withdrawal orders

If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 814 of this title or the proposing of a penalty under section 820 of this title.

* * * *

§ 821. Entitlement of miners to full compensation

If a coal or other mine or area of such mine is closed by an order issued under section 813 of this title, section 814 of this title, or section 817 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the

operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 814 of this title or section 817 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 813 of this title, section 814 of this title, or section 817 of this title, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5.

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 110(a), 83 Stat. 758:

ENTITLEMENT OF MINERS

SEC. 110. (a) If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 104 of this Act, all miners employed at the affected mine who would be withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

Supreme Court, U.S.
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(2)

No. 90-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

ROBERT H. STROPP, JR.
MARY LUCILLE JORDAN *
900 15th Street, N.W.
Washington, D.C. 20005
(202) 842-7200
Attorneys for United Mine Workers of America

* Counsel of Record

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QUESTION PRESENTED

The Respondent United Mine Workers of America does not agree with Petitioner's statement of the question presented. Properly, the question presented is as follows:

> Did the court below correctly decide, in light of the broad judicial deference required by *Chevron*, that one of its prior decisions, applying a standard of review inconsistent with that established by *Chevron*, did not require reversal of the agency's reasonable construction of its governing statute?

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

The Respondent, the International Union, United Mine Workers of America, (hereinafter "the UMWA"), submits that the petition for a writ of certiorari to review the order entered by the United States Court of Appeals for the District of Columbia Circuit in this case on February 9, 1990 should be denied. The Union concurs with Petitioner's discussion of the *Opinions Below*, *Jurisdiction*, and the *Statutory Provisions Involved*.

COUNTERSTATEMENT OF THE CASE

On the evening of June 21, 1983, an explosion tore through Clinchfield's McClure mine, located in Dickerson County, Virginia, killing seven miners and injuring three others. Early the next morning, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) arrived at the mine. The inspector issued an order under § 103(k) of the Federal Mine Safety & Health Act and shortly thereafter issued an imminent danger order under § 107(a) of the statute.[1] The two orders prevented all except certain government, company, and union personnel from entering the mine and authorized MSHA to supervise rescue and recovery work. The orders were not terminated until August 8, 1983 and July 18, 1983, respectively.

Within the 90 days provided under the regulations,[2] the UMWA filed an action under the third sentence of section 111 of the Mine Act. That statutory provision provides miners with up to a week's compensation for wages lost when the mine is idled by a closure order issued under § 107 "for a failure of the operator to comply with any mandatory health or safety standards."[3] The

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[1] Section 103(k), 30 U.S.C. § 813(k) (1982), App. 84a, authorizes the issuance of an order following an accident "to insure the safety of any person."

Section 107(a) of the Mine Act, 30 U.S.C. § 817(a) (1982), App. 86a, authorizes the issuance of a closure order where "an imminent danger exists."

[2] 29 C.F.R. § 2700.35.

[3] The third sentence of sec. 111 provides:

> If a coal or other mine or area of such mine is closed by an order issued under section 104 [30 U.S.C. § 814] or § 107 [30 U.S.C. § 817] of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is

UMWA contended that Clinchfield's violations caused the imminent danger which resulted in the § 107(a) order. Clinchfield moved for summary decision contending the statutory entitlement did not apply because the § 107(a) imminent danger order did not charge the operator with a violation of a mandatory standard. The administrative law judge denied the motion pending the outcome of MSHA's investigation into the cause of the explosion.

On March 26, 1984 upon concluding its investigation, MSHA cited the operator with violations of five mandatory safety standards. MSHA also determined that Clinchfield's "unwarrantable failure" to comply with these standards caused the explosion.[4] Clinchfield did not challenge the violations or the findings contained therein and paid the $50,000 in penalties assessed by MSHA.

In July 1984, the administrative law judge granted Clinchfield's renewed motion for summary decision. The judge recognized that MSHA had determined the explosion to have been caused by the operator's violations and expressed surprise that MSHA had not decided to amend the § 107(a) order to include the violations.[5] The judge nevertheless denied the miners' compensation claim because the § 107(a) imminent danger order, upon which their claim was based, did not itself allege a violation. *UMWA v. Clinchfield Coal Co.*, 6 FMSHRC 1782 (1984) (ALJ Moore), App. 77a.

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final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (1982), App. 87A.

[4] Section 104(d), 30 U.S.C. Section 814(d) 1982, App. 85a, requires the issuance of citations and orders when MSHA finds violations caused by the "unwarrantable failure" of the operator to comply with mandatory standards.

[5] However, as the court below noted: "the power to modify evidently ceases after an order has been terminated." 895 F.2d at 776, App. 6. (Citing to Labor Brief 14, n.10, J.A. 116).

The Federal Mine Safety & Health Review Commission granted the Union's petition for review and subsequently reversed the administrative law judge. The Commission determined that the statute's requirement that the imminent danger order be issued "for a failure of the operator to comply with any mandatory health or safety standards" was satisfied when the conditions which triggered the imminent danger order were later determined by MSHA to be caused by the operator's violations. *UMWA v. Clinchfield Coal Co.*, 8 FMSHRC 1310 (1986), App. 50a.

On remand to the administrative law judge, the parties stipulated to the existence of the required causal relation between the violations and the idling of the mine. Based on the stipulations, Commission ALJ Melick ruled that the miners were entitled to compensation and interest. *UMWA v. Clinchfield Coal Co.*, 9 FMSHRC 1276 (1987) (ALJ Melick), App. 39a. The Commission reaffirmed its inital ruling in a subsequent decision ordering payment of a week's wages plus interest. *UWMA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 App. 17a.

Clinchfield appealed to the U.S. Court of Appeals for the D.C. Circuit which unanimoulsy affirmed the Commission. *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773 (D.C. Cir. 1990), App. 1a. The Court saw "nothing unreasonable in the Commission's reading of the word 'for' to require one week compensation where there is a 'causal nexus' between a section 107(a) withdrawal order and a health or safety violation that is cited later." 895 F.2d at 775 App. 4a. Furthermore, the court noted that the normal deference due the Commission was heightened in this case since the Commission's interpretation was in accord with the position urged by the Secretary of Labor, who filed an amicus brief with the Commission in support of the UMWA. 895 F.2d at 776. App. 5a.[6]

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[6] S. Rep. No. 95-181, 95th Cong., 1st Sess. 49, U.S. Code Cong. & Admn. News 1977, p. 3401, 3448 (Secretary's interpretation of the Mine Act should be given weight by the courts).

The Court was also struck by the odd results that would occur under the interpretation urged by Clinchfield. If Clinchfield's position were adopted, miners could not get the week's worth of compensation provided by § 111 unless the MSHA inspector cited the violation at the time he issued the withdrawal order. The Court recognized that this is often impossible where the imminent danger required by § 107 has already materialized in an accident. In such cases MSHA often had to conduct a lengthy investigation before it could determine the violations that led to the accident. The court concluded that Clinchfield's position would "penalize miners in just those cases where safety violations are so severe that they result in a disaster." 895 F.2d at 776. (Quoting from the Secretary's amicus brief). The court also observed that the Commission's construction of § 111 furthered the purpose of that statutory provision by removing a possible deterrent to miners reporting imminent dangers or to the inspector promptly issuing a withdrawal order.[7]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, AFFIRMING AN AGENCY'S REASONABLE CONSTRUCTION OF ITS GOVERNING STATUTE, PRESENTS NO CONFLICT WITH THIS COURT'S DECISIONS NOR ANY IMPORTANT QUESTION OF FEDERAL LAW

The decision of the Court of Appeals implicates none of the considerations favoring grant of the writ of certiorari articulated by this Court's Rule 17. Rather, the decision below is a routine application of the standard of deference this Court has stated should be applied to rea-

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[7] S. Rep. *supra* at 47, noting that § 111 compensation will "remove any possible inhibition on the inspector in the issuance of closure orders". *Cf. Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975), relying on similar incentive effects on miners and inspectors in construing predecessor to § 111.

sonable constructions of a statute by the agency charged with implementing it. In this case, as the court noted, the deference due the Review Commission was heightened by the fact that the Commission's interpretation was consistent with the position taken by the Secretary of Labor. 895 F.2d at 776, App. 5a.

The Court upheld the Commission's determination that an imminent danger order is issued "for a failure of the operator to comply with any mandatory health or safety standards" when there is a "causal nexus" between the imminent danger and a health or safety violation that is cited later. Interpreting "for" to denote a causal connection is entirely reasonable and indeed is an interpretation found in a standard dictionary definition of the word.[8] Clinchfield argues for a construction that would limit third sentence compensation to those situations in which the closure order itself charges the operation with a violation. Clinchfield has not demonstrated that the Commission's interpretation is unreasonable. All it has done is offer an alternative way of interpreting the "for a failure" phrase.

The court below found it significant that Clinchfield's interpretation would penalize miners who were idled because the employer's violations were so severe that they resulted in a disaster. Under the restrictive interpretation urged by Clinchfield, miners would only be entitled to third sentence compensation when MSHA was able to describe the violation as part of the imminent danger order. The Secretary of Labor, who is charged with enforcing the Act, explained why this is frequently impossible:

> MSHA often cannot, and should not, specify the operator's violations on a withdrawal order issued

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[8] For: "Because or by reason of; on account of. *Funk and Wagnalls New Standard Dictionary of the English Language*, 1st Ed. 1945."

> immediately following a mine disaster. Most importantly, immediately after the disaster, it frequently is too dangerous for anybody to enter the mine to determine exactly what happened. Further, MSHA usually must devote its resources to rescuing miners and recovering the affected areas of the mine before it can even begin its accident investigation.

895 F.2d at 776. App. 5a.

The Commission's construction of § 111 holds that miners are entitled to compensation if MSHA subsequently determines that the imminent danger which triggered the closure order was a result of operator violations. The court concluded that such an approach "makes sense" especially in light of the legislative history indicating Congress' desire that miners not be deterred from reporting violations, and that inspectors not be inhibited from issuing withdrawal orders because of a concern that miners might lose wages as a result. 895 F.2d at 776, citing S. Rep. No. 95-181, 95th Cong., 1st Sess. 47 (1977); and *Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975), App. 5a-6a.

Clinchfield contends that an earlier decision by the D.C. Circuit, *District 6, UMWA v. United States Department of Interior Board of Mine Operations Appeals*, 562 F.2d 1260 (D.C.Cir. 1977) ("District 6"), precludes the award of compensation below and that the court's failure to apply that decision violates important principles of *stare decisis*. Contrary to Clinchfield's assertions, the decision below does not reflect a "casual overturning of many years of precedent," nor are there any important principles of *stare decisis* for this Court to address. Even if Clinchfield's position was well founded (which it is not) the issue would simply boil down to a conflict within a circuit. This is not a problem that merits granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). As Justice Harlan once wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable con-

flict since such differences are deemed an intramural matter to be resolved by the Court of Appeals itself." [9]

In any event, the decision below does not undermine principles of *stare decisis*. *Stare decisis* means that like facts will receive like treatment in a court of law. *Flowers v. U.S.*, 764 F.2d 759 (11th Cir. 1985). The factual context of the decision below differs from that found in *District 6*.

District 6 arose under § 110(a) of the 1969 Coal Act, predecessor to § 111 of the current statute.[10] That Act allowed miners to obtain up to a week's compensation when they were idled by an order issued under § 104 of this title "for an unwarrantable failure of the operator to comply with any health or safety standard." In *District 6* the Secretary of Interior issued an imminent danger order but never made the requisite findings that the operator unwarrantably failed to comply with a mandatory health or safety standard. The Interior Board of Mine Operations Appeals ("IBMA") and the Court of Appeals rejected the Union's attempt to prove the existence of the underlying violation so as to obtain third sentence compensation.

The decision below on the other hand, involves the 1977 Mine Act. Under that statute, the week long compensation entitlement has been broadened. Instead of being restricted to orders issued for an operator's "unwarrantable failure" violations, third sentence compensation is now triggered by an order issued simply for a failure of the operator to comply with any mandatory health or safety standard. More importantly, in this case, unlike *District 6*, MSHA made the requisite finding of violation.

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[9] Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 552 (1958), quoted in R. Stern and E. Grossman, *Supreme Court Practice*, 5th Ed. 276 (1986).

[10] Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742.

The Commission found such distinction significant and explained that here, unlike the situation in *District 6*, the Secretary of Labor, as enforcer of the Act, had initiated both the closure order and the allegations of violation. The UMWA, therefore, was not asking the Commission to make findings that were more properly the responsibility of the Secretary. The problem in *District 6* the Commission explained, was that the Union, instead of the agency, was attempting to prove the underlying violations. This amounted to the Union usurping the agency's prosecutorial discretion.[11] The court below found the Commision's reliance on this distinction a sufficient explanation for its failure to follow *District 6*. 895 F.2d at 778, App. 9a-10a.

Although the court below recognized the distinguishing features of the *District 6* case, it did not rely on those distinctions in explaining its refusal to reverse the Commission on the basis of that opinion. Rather, the court engaged in an extensive analysis of the binding effect, if any, of the *District 6* opinion in light of this Court's intervening opinion in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("Chevron").[12]

In *Chevron* this Court articulated a two step analytical framework that courts should employ when reviewing an agency's construction of its governing statute. The first job of the court is to determine "whether Congress has *directly* spoken to the *precise* question at issue." 467 U.S. at 842-43 (*emphasis added*). If so, then the court "must give effect to the unambiguously expressed intent

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[11] The Commission's explanation was contained in its decision in *UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1328-29, n.5, App. 57a, 73a-74a, which was incorporated by reference in its *Clinchfield* decision, 8 FMSHRC at 1311, App. 5a.

[12] It was appropriate for the court to reexamine existing precedent which has been undermined by a subsequent Supreme Court decision, *LeVick v. Skaggs Companies, Inc.*, 701 F.2d 777, 778 (9th Cir. 1983).

of Congress." *Id.* This Court cautioned however that in those situations where Congress has not addressed the precise issue, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 844.

The essence of Clinchfield's petition is that the court below erred when it determined that the *District 6* opinion was not based on a conclusion that Congress had spoken directly on the precise question at issue. Clinchfield argues that the *District 6* opinion reflects just such a conclusion and that the court below should have imposed the *District 6* interpretation on the Commission, rather than affirming the Commission's alternate, reasonable construction of the statute.

In spite of Clinchfield's arguments to the contrary, the conclusion reached by the court below, that *District 6* did not bind the Commission, is the correct one. As the decision below observed, the *District 6* court applied a narrower concept of judicial deference than what *Chevron* now plainly requires. The *District 6* court did not seek to determine whether Congress had unambiguously expressed its intent on the precise question in issue. That court was simply engaged in determining "how the legislature would have decided the specific issue if it had been specifically addressed by the legislature." *Clinchfield v. FMSHRC*, 895 F.2d at 777, App. 8a, quoting *District 6*, 562 F.2d at 1268 (Leventhal, J. concurring).

Although the *District 6* court struggled to determine "which interpretation Congress intended," *id.* this is not the same thing as making a finding that Congress clearly resolved the issue and, as the court below explained, "it leaves the Commission free to choose the other [interpretation] if reasonable." 895 F.2d at 778, App. 9a.[13]

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[13] Clinchfield complains that the court below ignored Clinchfield's argument that the Commission violated well settled principles safeguarding against improper retroactive application of new agency

Indeed, as noted by the court below, even the *District 6* court appeared to concede the reasonableness of the result reached in this case. Although it came to a different conclusion, the court observed that to construe § 111's predecessor as allowing payment even in absence of an order specifying violations would not be "completely outside the language of the statute . . . nor be one inconsistent with some of the general objectives of the Act." 895 F.2d at 778. App. 9a quoting 562 F.2d 1264-65. The court below therefore concluded that "affirmance of the Commision is consistent with *District 6*." (*Id.*).[14]

Even assuming *arguendo* that the court below incorrectly analyzed the *District 6* opinion, there is still no justification for granting certiorari. Although Clinchfield argues that there is "an important issue involving the imposition of unanticipated and unwarranted liability . . .", (Petition at 8) it is unclear to what extent the decision below will result in future liability for Clinchfield or any other mine operator. Clinchfield fails to explain that operators are only potentially liable for third sentence compensation upon MSHA's determination that conditions precipitating an imminent danger order resulted from the operator's violations. This is because operators have the ability under § 105(d), 30 U.S.C. § 815(d), to challenge any MSHA finding that a violation occurred.[15] A successful challenge to MSHA's finding of

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policy. (Petition at 12 n.12). The court properly ignored this argument since Clinchfield never raised it before the agency and, as the UMWA argued below, the court was therefore precluded from considering it under 30 U.S.C. section 816(a).

[14] Clinchfield argues that Congress' passage of the 1977 Mine Act implies approval of the *District 6* interpretation. (Petition at 14, n.4). The legislative history of the Mine Act contains no mention of the *District 6* opinion even though it does contain examples where Congress remarked approvingly about cases with which it agreed. *See i.e.* S. Rep. *supra* at 31, 32.

[15] Section 105(d) provides, in part:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest

violation defeats the third sentence requirement that the order be issued "for a failure of the operator to comply with any mandatory health or safety standards."

Even an ultimate determination that the violation occurred will not automatically result in an imposition of liability under the third sentence of § 111. This is because the Commission has determined that there must also be a "causal nexus" between the violation and the imminent danger which triggered the withdrawal order. Operators will have the opportunity to challenge any allegation that such "causal nexus" exists.

In short, Clinchfield's liability in this proceeding is only partly a result of the Court's refusal to be bound by the *District 6* opinion. Of equal consequence is Clinchfield's acquiescence in the Secretary's determination that Clinchfield's violations bore a causal connection to the explosion.[16]

II. THERE IS NO CONFLICT OF CIRCUITS

Petitioner Clinchfield contends that the decision below "conflicts in principle" with the decision of the Third Circuit in *Rushton Mining Co. v. Morton*, 520 F.2d 716

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the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

[16] Clinchfield did not challenge the violations issued as a result of MSHA's investigation and the operator stipulated to the causal nexus between the violations and the § 107(a) imminent danger order. (Petitioner's statement of the case at 5-6).

(Petition at 8, 11). Beyond the fact that the decision in *Rushton* also concerned a compensation claim, the two cases bear little similarity. The *Rushton* case most certainly does not present a conflict between circuits. Instead of the week's worth of compensation provided under the third sentence, the *Rushton* miners were seeking the limited payment provided by the first two sentences of § 110(a), which was the 1969 Coal Act's compensation provision.[17]

The issue before the *Rushton* court was "whether the Board may order compensation under [30 U.S.C.] § 820 (a) for miners idled by a withdrawal order which has been vacated subsequent to such loss of work."[18] 520 F.2d at 717. The court ultimately concluded that the limited compensation provided by the first two sentences of § 110(a) did not depend on the issuance of a valid withdrawal order.

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[17] Section 110(a) provided in relevant part:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 110(a), 83 Stat. 758.

Entitlement under the analogous provision of the current statue has been broadened so that compensation is triggered by withdrawal orders under sections 103 and 107 as well as section 104. The current compensation provision is set forth in its entirety at App. 86-87a.

[18] The reference to "Board" is a reference to the Interior Board of Mine Operations Appeals which decided cases under the 1969 Coal Act.

Since the *Rushton* miners were not claiming the week's compensation provided by the third sentence, the court never had occasion to discuss the meaning of the requirement that the withdrawal order be issued "for an unwarrantable failure of the operator to comply with any health or safety standard." The *Rushton* analysis of third sentence compensation was limited to the court's observation that compensation was required under that provision only when the order was "final." The court concluded that the lack of a similar finality requirement in the first two sentences meant that the miners were still entitled to the limited compensation provided therein, even when the withdrawal order idling the miners was subsequently vacated.

Thus it is evident that the *Rushton* case, dealing with an entirely different issue, poses no conflict with the decision below, even "in principle." Indeed the court below relied on *Rushton* in concluding that the Commission's decision was consistent with the legislative history. 895 F.2d at 776, App. 5a.

CONCLUSION

The Court of Appeals correctly applied this Court's policy of deference to any agency's construction of its governing statute. The decision did not violate principles of *stare decisis* nor did it pose a conflict with any other circuit. There is no reason for granting the writ.

Respectfully submitted,

ROBERT H. STROPP, JR.
MARY LUCILLE JORDAN *
900 15th Street, N.W.
Washington, D.C. 20005
(202) 842-7200
Attorneys for United Mine Workers of America

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* Counsel of Record